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In The

# Supreme Court of the United States

October Term, 1976

HAZELWOOD SCHOOL DISTRICT; C. O. McDONALD, Superintendent; ROBERT BISCHOF, ROBERT COLEMAN, DOROTHY SMITH, CHARLES SWEENEY, DONALD MATTOX and MILTON STRAUSS, Members of the Board of Education of the Hazelwood School District,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

## BRIEF FOR PETITIONERS

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## TABLE OF CONTENTS

Page

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 2

QUESTIONS PRESENTED ..... 3

STATEMENT ..... 4

SUMMARY OF ARGUMENT ..... 12

ARGUMENT ..... 16

I. TITLE VII CANNOT CONSTITUTIONALLY PROHIBIT EMPLOYMENT PRACTICES BY AN AGENCY OF A STATE GOVERNMENT IN THE ABSENCE OF PROOF OF PURPOSEFUL DISCRIMINATION, AND THERE WAS NO SUCH PROOF HERE ..... 18

A. The Commerce Clause Does Not Authorize Congress To Interfere with the Hiring Practices of a State Agency ..... 19

B. Section 5 of the Fourteenth Amendment Does Not Empower Congress To Prohibit Employment Practices by a State Agency in the Absence of Proof of Purposeful Discrimination, And There Was No Such Proof Here ..... 23

1. Proof Of Purposeful Discrimination Is Required To Establish A Violation Of The Equal Protection Clause, And There Was No Such Proof Here ..... 24

Page

a. Purposeful discrimination is essential to a finding that a state or state subdivision has denied to some within its jurisdiction the equal protection of the laws ..... 24

b. There are no findings of purposeful discrimination here and no evidence on which such findings could be made ..... 26

2. Congress May Not Prohibit State Conduct Under Section 5 Of The Fourteenth Amendment In The Absence Of Proof Of Purposeful Discrimination ..... 31

a. This Court's decision in *Katzenbach* v. *Morgan* is not authority that the Section 5 enforcement power may be used to proscribe state conduct when no deprivation of constitutional rights is involved ..... 32

b. Congress intended the substantive prohibitions of Title VII to be no broader than the scope of the equal protection clause ..... 38

c. There was no denial of the equal protection of the laws here under controlling decisions of this Court and no room for a contrary congressional judgment ..... 42

d. Title VII as construed below encourages discrimination and therefore cannot be "appropriate" legislation to enforce the equal protection clause ..... 43



Page

II. SINCE HAZELWOOD'S HIRING PRACTICES WERE DIRECTLY SHOWN NOT TO EXCLUDE A DISPROPORTIONATE NUMBER OF APPLICANTS, COMPARATIVE WORKFORCE STATISTICS, FAULTY IN ANY EVENT, CANNOT SUSTAIN A FINDING OF A VIOLATION OF TITLE VII ..... 44

A. Since the Record Showed the Rate at Which Hazelwood Hired Black Applicants and That Rate Was Higher Than the Rate At Which It Hired Applicants Generally, Reliance on Area Workforce Statistics Was Unwarranted ..... 45

B. Even If Hazelwood's Hiring Practices Are Considered in Light of Area Workforce Statistics, It Is Clear That Those Practices Have Not Resulted in a Disproportionate Exclusion of Blacks ..... 49

1. Hazelwood Has, Since Title VII Became Applicable To It, Hired Black Teachers Substantially In Proportion To The Black Share Of The Pool Of Applicants In The Labor Market Who Are Reasonably Available For Employment By Hazelwood ..... 51

a. The pool of applicants ..... 52

b. Hazelwood's hiring ..... 56

2. Since Hazelwood Has Hired Black Teachers Substantially In Proportion To The Black Share Of The Pool Of Those Available For Employment, The Fact That Hazelwood's Overall Teacher Workforce Includes A Lower Proportion Of Blacks Than Are Employed As Teachers In The Labor Market Is Not Evidence That Hazelwood Discriminated In Hiring ..... 57

Page

III. THE EVIDENCE AS TO 14 BLACK APPLICANTS WHO WERE NOT INTERVIEWED AND TWO OTHERS WHO WERE INTERVIEWED BUT NOT HIRED DOES NOT SHOW OR TEND TO SHOW THAT HAZELWOOD DISCRIMINATED IN HIRING, AND THE HANDLING OF THE 16 CASES DEMONSTRATES THAT HAZELWOOD'S HIRING PROCEDURES WERE APPLIED FAIRLY TO BLACKS ..... 61

A. Hazelwood's Two-Step Hiring Process, Involving First Selection for Interviews and Then Interviews, Is Not a Racially Discriminatory Process on Its Face ..... 62

B. Hazelwood Did Not Discriminate in the Selection of Applicants To Be Interviewed ..... 66

C. Hazelwood Did Not Discriminate in the Selection of New Employees from among Those Applicants Who Were Interviewed ..... 73

CONCLUSION ..... 78



## TABLE OF AUTHORITIES

Page

**Cases:**

*Albemarle Paper Co.* v. *Moody*,
422 U.S. 405 (1975) ..... 41, 45

*Bivens* v. *Six Unknown Federal Narcotics Agents*,
403 U.S. 388 (1971) ..... 42

*Brown* v. *Board of Education*,
347 U.S. 483 (1954) ..... 7, 16, 20

*Castro* v. *Beecher*,
459 F.2d 725 (1st Cir. 1972) ..... 45

*Chance* v. *Board of Examiners*,
330 F. Supp. 203 (S.D.N.Y. 1971),
*aff'd*. 458 F.2d 1167 (2d Cir. 1972) ..... 28, 46, 76

*Coopersmith* v. *Roudebush*,
517 F.2d 818 (D.C. Cir. 1975) ..... 76

*Davis* v. *Schnell*,
81 F. Supp. 872 (S.D. Ala.), *aff'd per curiam*,
336 U.S. 933 (1949) ..... 30

*Epperson* v. *Arkansas*,
393 U.S. 97 (1968) ..... 20

*Espinoza* v. *Farah Mfg. Co.*,
414 U.S. 85 (1973) ..... 41

*Ex parte Virginia*,
100 U.S. 339 (1879) ..... 23, 33, 43

*Fitzpatrick* v. *Bitzer*,
96 S. Ct. 2666 (1976) ..... 17, 42

*Gaston County* v. *United States*,
395 U.S. 285 (1969) ..... 36

Page

*General Electric Co.* v. *Gilbert.*
97 S. Ct. 401 (1976) ..... 41

*Goss* v. *Lopez.*
419 U.S. 565 (1975) ..... 20

*Griffin* v. *Breckenridge.*
403 U.S. 88 (1971) ..... 37

*Griffin* v. *County School Board.*
377 U.S. 218 (1964) ..... 30

*Griggs* v. *Duke Power Co.*.
401 U.S. 424 (1971) ..... 41, 45, 58, 67, 75

*Grosjean* v. *American Press Co.*.
297 U.S. 233 (1936) ..... 30

*Johnson* v. *Railway Express Agency, Inc.*.
421 U.S. 454 (1975) ..... 37

*Jones* v. *Alfred H. Mayer Co.*.
392 U.S. 409 (1968) ..... 36

*Katzenbach* v. *Morgan.*
384 U.S. 641 (1966) ..... 13, 14, 23, 32, 33, 34, 35, 36, 37, 38, 39, 42, 43

*Keyes* v. *School District No. 1.*
413 U.S. 189 (1973) ..... 29

*Lane* v. *Wilson.*
307 U.S. 268 (1939) ..... 30

*Lau* v. *Nichols.*
414 U.S. 563 (1974) ..... 37

*Logan* v. *General Fireproofing Co.*.
521 F.2d 881 (4th Cir. 1971) ..... 46

*McCulloch* v. *Maryland.*
4 Wheat. 316 (1819) ..... 23



Page

*McDonnell Douglas Corp.* v. *Green.*
411 U.S. 792 (1973) ..... 41, 72, 75

*Maryland* v. *Wirtz.*
392 U.S. 183 (1968) ..... 12, 19, 20

*Milliken* v. *Bradley.*
418 U.S. 717 (1974) ..... 20, 42

*National League of Cities* v. *Usery.*
96 S. Ct. 2465 (1976) ..... 12, 19, 20, 21, 22, 37

*Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 97 S. Ct. 583 (1977) ..... 37

*Oregon* v. *Mitchell.*
400 U.S. 112 (1970) ..... 14, 35, 36, 38

*Reitman* v. *Mulkey.*
387 U.S. 369 (1967) ..... 30

*Rizzo* v. *Goode.*
423 U.S. 362 (1976) ..... 42

*Runyan* v. *McCrary.*
96 S. Ct. 2586 (1976) ..... 37

*Smith* v. *Board of Education of Morrilton School District No. 32.* 365 F.2d 770 (8th Cir. 1966) ..... 76

*Snowden* v. *Hughes.*
321 U.S. 1 (1944) ..... 26, 40

*South Carolina* v. *Katzenbach.*
383 U.S. 301 (1966) ..... 34, 36

*Sullivan* v. *Little Hunting Park, Inc.*.
396 U.S. 229 (1969) ..... 37

*Tillman* v. *Wheaton-Haven Recreation Ass'n, Inc.*.
410 U.S. 431 (1973) ..... 37

Page

*Tinker* v. *Des Moines School District.*
393 U.S. 503 (1969) . . . . . 20

*United States* v. *City of Chicago.*
385 F. Supp. 543 (N.D. Ill. 1974) . . . . . 28

*United States* v. *Guest.*
383 U.S. 745 (1966) . . . . . 31

*Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*,
97 S. Ct. 555 (1977) . . . . . 13, 24, 26, 27, 29

*Wade* v. *Mississippi Cooperative Extension Service.*
372 F. Supp. 126 (N.D. Miss. 1974) . . . . . 28

*Washington* v. *Davis.*
426 U.S. 229 (1976) . . . . . 12, 13, 24, 25, 26, 27, 28, 40, 41

*Wright* v. *Council of the City of Emporia.*
407 U.S. 451 (1972) . . . . . 41

*Yick Wo* v. *Hopkins.*
118 U.S. 356 (1886) . . . . . 26, 29, 72

**Constitutional and Statutory Provisions:**

United States Constitution
Article I, section 8, cl. 18 . . . . . 23
Thirteenth Amendment, section 2 . . . . . 36
Fourteenth Amendment, section 1 . . . . . 2
Fourteenth Amendment, section 5 . . . . . 2, 3, 13, 17, 18, 23, 24, 30, 31, 32, 34, 35, 36, 37, 43
Fifteenth Amendment, section 1 . . . . . 36
Fifteenth Amendment, section 2 . . . . . 36

California Constitution
Article I, section 26 . . . . . 30

18 U.S.C. § 241 . . . . . 31



Page

18 U.S.C. § 243 . . . . . 33

28 U.S.C. § 1254(1) . . . . . 2

Civil Rights Act of 1866
42 U.S.C. § 1982, section 1 . . . . . 37

Civil Rights Act of 1964, 78 Stat. 253, Title VII
42 U.S.C. § 2000e, *et seq.* . . . . . *passim*
Section 703, 42 U.S.C. § 2000e-2 . . . . . 3, 5, 16
Section 705, 42 U.S.C. § 2000e-4 . . . . . 32
Section 706, 42 U.S.C. § 2000e-5 . . . . . 32
Section 707, 42 U.S.C. § 2000e-6 . . . . . 3, 5, 16, 32, 40, 41
Section 708, 42 U.S.C. § 2000e-7 . . . . . 32
Section 709, 42 U.S.C. § 2000e-8 . . . . . 32
Section 710, 42 U.S.C. § 2000e-9 . . . . . 32

Equal Employment Opportunity Act of 1972,
86 Stat. 103 . . . . . 2, 16, 18, 19, 39

Voting Rights Act of 1965,
42 U.S.C. § 1973b(e) . . . . . 33

Voting Rights Act Amendments of 1970,
84 Stat. 313 . . . . . 35

**Legislative Materials:**

Hearings on S. 818, S. 2456, S. 2507 & Title IV of S. 2029 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 2d Sess. (1970) . . . . . 35

H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971) . . . . . 18, 23, 39, 40

S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971) . . . . . 18, 19, 23, 39, 40

116 Cong. Rec. (1970) . . . . . 35

118 Cong. Rec. (1972) . . . . . 18, 19, 23, 39, 40

Page

**Miscellaneous:**

Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 S. Ct. Rev. 81 ..... 35

Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 Stan. L. Rev. 603 (1975) ..... 35

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

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## BRIEF FOR PETITIONERS

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## OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Missouri, which is reported at 392 F. Supp. 1276, appears at Appendix A of the Petition, pp. 1a-26a. The opinion of the United States Court of Appeals for the Eighth Circuit, which is reported at 534 F.2d 805, is reprinted at Appendix B of the Petition, pp. 1b-32b.

## JURISDICTION

The judgment of the court of appeals, reversing a judgment of the district court in petitioners' favor, was en-

tered on April 20, 1976, and on May 25, 1976, the court of appeals denied a timely petition for rehearing and suggestions for rehearing en banc. (Pet. Apps. C, D.) A petition for a writ of certiorari was filed on August 20, 1976, and was granted on January 10, 1977. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "SECTION 1. . . . [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> "SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Section 701 of the Civil Rights Act of 1964, 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. § 2000e, provides in pertinent part:

"For the purposes of this title—

> (a) The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.
>
> (b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ."



Section 703(a)(1) of the Civil Rights Act of 1964, 78 Stat. 255, 42 U.S.C. § 2000e-2, provides:

"(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . ."

Section 707(a) of the Civil Rights Act of 1964, 78 Stat. 261, 42 U.S.C. § 2000e-6(a), provides:

"(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described."

## QUESTIONS PRESENTED

1. Whether Congress has authority under Section 5 of the Fourteenth Amendment to prohibit by Title VII of the Civil Rights Act of 1964 employment practices of an agency of a state government in the absence of proof that the agency purposefully discriminated against applicants on the basis of race.

2. Whether a court may disregard evidence that an employer has treated actual job applicants in a nondiscriminatory manner and rely on undifferentiated workforce statistics to find an unrebutted prima facie case of employment discrimination in violation of Title VII of the Civil Rights Act of 1964.

## STATEMENT

The Hazelwood School District lies in the northernmost tip of St. Louis County, Missouri. It was organized between 1949 and 1951 from more than a dozen school districts, none of which provided instruction beyond the eighth grade. At that time the area of 78 square miles that was brought within the single Hazelwood District was farming country. Hazelwood operated just eight schools at the beginning, with 811 students. There were 27 faculty members. None of the students and none of the teachers was black. (Pet. App. A 2a-3a.)[1]

Since 1951, the area served by the Hazelwood School District has become a populous outlying suburb of St. Louis. School enrollment and faculty size have grown enormously. By 1970 Hazelwood operated a system of schools through high school, and in 1973-74, the last year for which there are data of record, more than 25,000 students were enrolled, about 500 of them black, and there were about 1,200 teachers and other academic professionals, 22 of them black. (Pet. App. A 3a; Pl. Ex. 55.)

This case concerns the hiring of black professionals by Hazelwood. A complaint was filed by the Attorney General

[1]Most facts are uncontested at this point, and citations for factual propositions are principally to the opinions of the district court (Pet. App. A__) and the court of appeals (Pet. App. B__), which are reproduced in the appendices to the petition for certiorari. Other citations are to the appendix in this Court (App. ____), the joint appendix below (R. __), the transcript of the trial (Tr. __) and exhibits (Pl. Ex. __).



in the name of the United States asserting violations by Hazelwood in such hiring of Title VII of the Civil Rights Act of 1964 and the equal protection clause of the Fourteenth Amendment. (App. 2-6.) Section 703(a)(1) of the Civil Rights Act of 1964 (p. 3, *supra*) makes it an unlawful employment practice for an "employer" — redefined in 1972 to include "governments, governmental agencies, [and] political subdivisions" (p. 2, *supra*) — to fail or refuse to hire any individual because of his race, color, religion, sex or national origin. Section 707(a) of the Act (p. 3, *supra*) empowers the Attorney General to bring suits against any person that he has "reasonable cause to believe . . . is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by" Title VII and when he has reasonable cause to believe that "the pattern or practice is of such a nature and is intended to deny the full exercise of the rights" described in Title VII.

Although Title VII was made applicable to state and local governmental bodies only in 1972, the record made on the Government's complaint covers a longer period. It showed:

In the early and middle 1960's, there were more open teaching jobs than applicants as enrollment in such school districts as Hazelwood grew rapidly. Then a dramatic turnaround in the nationwide market for teachers occurred as school enrollment growth slowed, and in recent years there have been more applicants for teachers' jobs than jobs. When the sellers' market prevailed, Hazelwood engaged in quite extensive recruiting of teachers. (Pet. App. A 3a-4a; App. 54.)

More recently Hazelwood has been able to get along with a minimum of recruiting. Without trying, it has several qualified applicants for every open teaching position. In the 1971-72 school year there were 3,127 applicants for 234 open faculty positions. In 1972-73 there were 2,373 applications for 282 teaching vacancies. (Pet. App. A 4a; Tr. 385.)

To make the choices that this abundance of job applicants requires, Hazelwood depends primarily on the principals of its elementary schools and the principals and department heads of its secondary schools. A central office receives, catalogues and indexes completed applications and makes applicants available for interviews when job openings occur. The interviews are conducted by principals in elementary schools and by department heads and sometimes the principals in junior and senior high schools. (Pet. App. A 4a-5a; App. 15-16, 20-21, 24-25, 28-31, 38-41, 63-65, 67-68.)

Recommendations made or endorsed by the principals on the basis of the interviews are routinely honored in hiring decisions that are made formally by the superintendent of schools and ratified by the Board of Education. (App. 10-11, 24-25, 39, 46-47.) Hazelwood's policy is to hire as teachers "the best possible certified persons within the financial ability of the district without consideration as to age, sex, race, national origin, political or religious beliefs." (App. 11.) All of the school officials whose testimony is of record here emphasized that their sole aim is to obtain the most competent teachers they can. (App. 18, 21, 25, 48, 60, 65.) Hazelwood has no other formal standards. Advanced degrees do not count for much, if anything. (App. 22, 27, 51.) Nor does mere length of experience. (*Id.*) There are standardized evaluation sheets for use by elementary and secondary school interviewers, but the criteria are general. (App. 16-17, 317-18.) There is no effort to quantify what cannot be quantified or to pretend to apply objective measurements of likely success in the classroom that experience indicates do not exist. The principals, coordinators and superintendents who testified agreed on the importance of certain factors: a prospective teacher's attitude toward his or her work and toward children; the applicant's knowledge of the subject matter to be taught, especially in secondary schools, his or her quality of expression, manner around children and personal appearance. (App. 22, 26, 48-51, 68-69.) To make possible informed judgments as to what applicant will best serve the educational needs of Hazelwood's students, applicant interviews may last as long as an hour or an hour and a half. (See generally Pet. App. A 4a-6a; App. 26.)



Before 1954 public schools throughout Missouri were segregated by command of State law. (Pet. App. A 17a.) Furthermore, only white teachers were allowed to teach in schools with white students and only black teachers in schools with black students. There was never any occasion to enforce racial segregation in the schools of the Hazelwood District (or, so far as appears, its predecessors) because there were no black residents in the area.[2]

When the first black student actually enrolled in a Hazelwood school does not appear from the record. In the 1967-68 school year there were 59 black students. (Pl. Ex. 55.) The first black teacher was hired by Hazelwood for the 1969-70 school year. (Pet. App. A 3a; Pl. Ex. 70.) Offers were made to black applicants for teachers' jobs before that. (App. 52.)

In recent years black teachers have been hired in increasing numbers. Indeed, black applicants for teaching jobs as a group apparently have fared better in the Hazelwood hiring process than white applicants. The number of black professionals in the system has grown from six in 1970-71 and seven in 1971-72 to 16 in 1972-73 to 22 in

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[2]Late in 1954, after this Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954), the superintendent of schools reported to the Board of Education that a black family that might have school-age children had moved into the District. The Board instructed that any black resident children be admitted into the appropriate school but suggested that the superintendent offer to pay tuition at a school in some other district in view of the otherwise complete absence of blacks from the Hazelwood schools. (Pet. App. A 2a; App. 428.)

1973-74.[3] The Government identified on the record 52 unsuccessful black applicants for teaching positions, principally concentrated in the 1972-73 and 1973-74 school years.[4] If there were a total of 52 unsuccessful black applicants for those two years, then since 15 other black applicants were hired for those two years, the hire rate for black applicants was 22 percent. On the other hand, for the 1971-72 and 1972-73 school years, Hazelwood, as indicated above, had a total of 5,500 applicants for 516 open positions. The overall hire rate in these two years, then, was less than 10 percent, half the rate for black applicants. Even if the Government failed to identify as many as half the unsuccessful black applicants on the record, the black rate of teacher hire exceeded the apparent general rate of teacher hire in the period.

The record contains census figures indicating that 15 percent of all teachers in St. Louis City and County combined in the census year of 1970 were black (App. 408-11), while the 22 black Hazelwood faculty members in the 1973-74 school year were slightly less than 2 percent of the total Hazelwood faculty of about 1,200 (Pl. Ex. 55).[5] The Gov-

[3]See Pet. App. A 3a. The record source for most of the figures stated by the district court is Pl. Ex. 55, a reproduction of reports by Hazelwood to federal authorities. Hazelwood was required to report on the composition of its faculty only biannually, for the years 1970-71 and 1972-73, for example, until 1973; the figure of seven black faculty members for 1971-72 is not of record but is taken from Hazelwood's internal records.

[4]At trial, the Government produced Pl. Ex. 49, which listed 61 persons asserted to have been unsuccessful black applicants. Seven names were deleted prior to the exhibit's introduction into evidence. Other evidence showed that of the remaining 54 persons, one was in fact hired by Hazelwood and another was offered a job but declined it. For reasons that are not entirely clear, both the district court and the court of appeals referred repeatedly to the number of unsuccessful applicants as 55.

[5]The record contains several different figures for Hazelwood's faculty size. For the 1973-74 school year, the District's total full-time (continued)



ernment relied heavily on the contrast between the 15 percent black teacher figure for the area that it took as the relevant market for Hazelwood's teacher recruitment and Hazelwood's own 2 percent black faculty figure.

The district court found the comparison irrelevant because the 15 percent figure "is distorted by the inclusion of data from the St. Louis City district, which contains a much higher ratio of black teachers . . . ." (Pet. App. A 19a.) Indeed, the St. Louis school district, which employs over one fourth of the teachers in the combined City-County area, consciously and deliberately attempts to maintain a faculty that is 50 percent black. (App. 94-95.) This fixed 50 percent quota is not based on the availability of black applicants for teaching vacancies or on the percentage of actual applicants for teaching positions there who are black. (*Id.*)

The district court noted the figures mentioned above indicating the growth in the number of black faculty members at Hazelwood and the relative success of blacks as job applicants. (Pet. App. A 19a, 25a.) Having found no overall pattern of discrimination, the district court saw nothing discriminatory in Hazelwood's failure to hire the unsuccessful black applicants identified by the Government at trial. (*Id.* at 25a.) It rendered judgment for the defendants, the Hazelwood District, the superintendent of schools and members of the Board of Education.

[5](continued)
professional staff, including the superintendent's staff, principals, teachers, counselors, librarians, and others, numbered 1,321. (Pl. Ex. 55.) Of that group, there were 1,188 classroom teachers, counselors and librarians. In 1972-73, the District's professional staff—apparently excluding personnel not assigned to a single school—numbered 1,230, and there were 1,107 classroom teachers. (*Id.*) The district court placed the size of the "full-time professional faculty" in 1973-74 at 1,231 (Pet. App. A 3a), which may have been a transposition of digits in the 1,321 figure stated above. The district court's 1,231 figure was unquestioned and was adopted by the court of appeals (Pet. App. B 4b).

The judgment was reversed on appeal by a divided panel of the court of appeals. (Pet. App. B 1b-32b.) The majority of the court ignored the statistics indicating that Hazelwood had been hiring black applicants at twice the rate at which it was hiring whites and accepted as controlling the Government's comparison of the 15 percent census figure for the combined City and County with Hazelwood's 2 percent figure.

> "The law is well-settled that the relevant consideration in an employment discrimination case is the statistical disparity between the proportion of blacks in the employer's workforce and the proportion of blacks in the labor market." (Pet. App. B 11b.)

The court held that the disparity between 15 percent and 2 percent established a "*prima facie* case of a pattern or practice of employment discrimination in violation of Title VII" (*id.* at 14b), which Hazelwood had not rebutted. The court said that the statistical evidence should be considered in the light of Hazelwood's "hiring procedures" described above (*id.*), which it elsewhere said "may be the crux of the problem," apparently because Hazelwood had not attempted to establish some kind of objective standards for its hiring decisions (*id.* at 4b).

The court of appeals also said that the statistical showing was buttressed by "evidence of actual discriminatory practices in the hiring of teachers during the period prior to the effective date of Title VII . . . ." (*Id.* at 14b.) These "practices" were (1) a newspaper advertisement for teachers that appeared in 1962 in a Jackson, Mississippi, newspaper with a restrictive "white only" phrase that may or may not have been in the School District's copy as submitted (App. 56-57, 70, 76)—the same advertisement appeared elsewhere without the restrictive phrase (App. 73, 74), and the man who was superintendent of schools at the time testified that he would not have included the phrase in any advertising material sent out of his office because it was contrary to the



District's policy (App. 56-57); (2) the failure, in the years when Hazelwood was actively recruiting, to pursue recruitment efforts at colleges with predominantly black student bodies, beyond one visit to such a college, where, not surprisingly, there was little interest in all-white Hazelwood among black students who foresaw a sellers' market for their services (Pet. App. A 3a-4a; B 9b n.6); and (3) the possible use until the early 1960's of application forms with racial identifications on them, which would have had to be used to satisfy Missouri law before 1954 (Pet. App. A 4a; R. 46-47, 55-56).

The court, finally, found that in 16 of the 52 individual black applicants' cases presented by the Government there was a prima facie case of discrimination and that these individual cases buttressed its finding of a pattern or practice of discrimination. (Pet. App. B 14b, 17b-25b.)

The court of appeals reversed the judgment of the district court and remanded, ordering wide-ranging specific injunctive relief. (*Id.* at 26b-28b).[6] Although in opening his case in the district court, counsel for the Government had said that his evidence would show that what he described as the lack of black professional employees in Hazelwood "does not result from chance but is the result of purpose" (Tr. 8), the court made no finding of any discriminatory purpose motivating Hazelwood's em-

[6]The court of appeals ordered that the injunctive relief against Hazelwood include (1) a permanent injunction against further discrimination, (2) promulgation of job descriptions and hiring criteria, (3) inclusion in recruiting and application materials of requirements for teaching positions and procedures by which selections are made, (4) equal notice of available openings to all applicants, (5) visits to predominantly black colleges and other institutions in any recruiting, (6) assurance of student-teaching opportunities for black college students, (7) periodic reports to the Justice Department for three school years, (8) maintenance for three years of a record explaining selection of any white applicant over an available black, (9) offer to 16 previously unsuccessful black applicants of first available teaching positions for which they are qualified, and (10) back pay. (Pet. App. B 26b-28b.)

ployment practices, and it did not find a violation of the Fourteenth Amendment.

The decisions of this Court in *National League of Cities* v. *Usery*, 96 S.Ct. 2465 (1976), and *Washington* v. *Davis*, 426 U.S. 229 (1976), were rendered after the judgment below. The court below did not consider whether the mere statistical showing of disparate treatment of blacks that it perceived, buttressed as it thought the Government's case here had been by the evidence of Hazelwood's history, its decentralized hiring procedures, and the cases of the 16 blacks not offered jobs, could properly be the premise of a judgment against a political subdivision of a sovereign state and the imposition of sanctions on it. The court did not consider whether, instead, a finding of purposeful discrimination on evidence that would support such a finding, such as would be required in a case arising solely under the Fourteenth Amendment, was also necessary here if sanctions were to be imposed on a local governmental body.

## SUMMARY OF ARGUMENT

### I

Title VII of the Civil Rights Act of 1964 as applied to state and local governmental bodies cannot be sustained as an exercise of Congress' commerce power, whatever may have been the view when the amendment making it applicable to state and local governments was enacted. In *National League of Cities* v. *Usery*, 96 S. Ct. 2465 (1976), the Court held that the Fair Labor Standards Act could not constitutionally be applied to prescribe the minimum pay and maximum working hours of state and local governmental employees, in that case policemen and firemen. In doing so, it overruled *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), which had sustained the statute in its application to employees of state schools and hospitals. If Congress cannot prescribe the wages and hours of public employees, including school employees, it cannot prescribe how public school districts must go about hiring and promoting their employees.



Congress also invoked Section 5 of the Fourteenth Amendment in making Title VII applicable to state and local governments. In some circumstances, and in any case if so read as to be no more than commensurate with the equal protection clause of the Fourteenth Amendment, Title VII so applied is undoubtedly appropriate legislation to enforce the equal protection clause of the Fourteenth Amendment and therefore authorized by Section 5. But a state or local statute, regulation or other governmental action denies the equal protection of the laws in violation of the Fourteenth Amendment only if it is purposefully discriminatory. It is not enough that it has effects that differ for different groups, even different racial groups. *Washington* v. *Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 97 S. Ct. 555 (1977).

Here Title VII was interpreted and applied to prohibit hiring practices that the court below found to produce racially disparate results, principally on the basis of a statistical comparison of the proportion of black teachers on the Hazelwood School District faculty and the proportion of black teachers in what the court took to be Hazelwood's labor market. The court did not find that Hazelwood had purposefully discriminated against black applicants for teaching positions, and it could not have so found on the record.

Neither this Court's decision in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), nor any other decision of the Court holds that Section 5 gives Congress the authority to proscribe state action that under this Court's precedents does not work a denial of the equal protection of the laws, in the absence of considerations not present here such as a necessity to remedy past constitutional violations. *Compare*

*Oregon* v. *Mitchell*, 400 U.S. 112 (1970). The *Morgan* decision, sustaining a sharply-focused invalidation of a particular action of a single state that was reasonably taken to work a denial of equal protection, does not support the present application of Title VII, which has been used by the court below as a basis for imposing severe injunctive, preferential hire and backpay sanctions on Hazelwood for unintended racially disparate consequences of employment practices that are racially neutral on their face. A public employer whose employment practices produce such unintended consequences has been held by this Court not to deny the equal protection of the laws, and in amending Title VII Congress made no contrary judgment. Moreover, there is no element here of remedy for past unconstitutional discrimination, and the sanctions imposed by the court would force the Hazelwood School District to make racially-motivated hiring decisions that could themselves be asserted to deny non-black teacher job applicants the equal protection of the laws.

## II

Even if it were the law that a showing of unintended racially disparate consequences of hiring practices could suffice to make out a violation of Title VII, there has been no such showing here. The court below relied principally on fatally flawed statistical proof in finding a prima facie violation of Title VII. The proof was that, according to the 1970 census, 15 percent of all the teachers in St. Louis City and County combined are black whereas in the most recent year for which data are of record less than 2 percent of Hazelwood's faculty was black. But comparisons of the composition of an employer's workforce and the composition of his labor market are appropriate only in circumstances that did not obtain here—notably circumstances in which it is impossible to measure directly



how the employer has dealt with black job applicants. The direct evidence is the best evidence when it is available. In this case there is evidence of Hazelwood's treatment of black job applicants. The evidence is that apparently they fared somewhat better as a group than white applicants. There is no indication, moreover, that black prospects were discouraged from applying or that there was any other impediment to a full voluntary representation of blacks among job applicants. Furthermore, the workforce-labor market comparison used by the court of appeals as the basis of its decision is itself flawed by (1) the fact that the St. Louis labor market is dominated by the schools of the City of St. Louis, which attempt to maintain a faculty that is 50 percent black, succeed or nearly succeed in doing so and thereby distort the labor market figures and preempt the available black teachers, and (2) the fact that the comparison is with Hazelwood's entire workforce, largely the result of hiring before Title VII applied to it, and not with its new black teacher hires, which only recently have been made in significant numbers.

## III

The decision below cannot be sustained independently of the flawed statistical proof. The court found fault with Hazelwood's decentralized hiring procedures because of an asserted lack of objective standards for hiring decisions, and it found that in 16 cases (of 52 presented by the Government) unsuccessful black applicants for teaching jobs had shown a prima facie case under Title VII because others no better qualified had been hired for jobs for which they were not hired. Analysis of these cases shows that there was no discrimination and that Hazelwood's hiring procedures, fair on their face, were administered fairly.

## ARGUMENT

The court of appeals did not find that Hazelwood had purposely discriminated against black applicants for teaching positions. It could not have so found on the record. The court did not hold that Hazelwood's past or current hiring procedures denied to black applicants the equal protection of the laws, in violation of the Fourteenth Amendment, to which as a public body Hazelwood has always been subject. The Court rather found a "disparity between the proportion of blacks in Hazelwood's workforce and the proportion of blacks in the relevant labor market" (Pet. App. B 14b) and, principally on the basis of this finding, concluded that a prima facie case was established under Title VII of the Civil Rights Act of 1964, to which Hazelwood was subject beginning only with its teacher hiring for the 1972-73 school year.[7] It also found separately that a prima facie case of employment discrimination was made as to 16 black applicants for teaching jobs on a showing that they were qualified for jobs that were not offered to them and that the jobs went to white applicants no better qualified.

The court said that the prima facie case had not been rebutted, and it therefore concluded that Hazelwood had violated Section 703(a)(1) of the Act. (P. 3, *supra.*) It granted broad injunctive, preferential hiring and backpay relief upon the Government's request under Section 707 (p. 3, *supra*), on the theory that Hazelwood was responsible for a pattern or practice of denial of equal employment opportunity rights.

The court thus applied Title VII of the Civil Rights Act to a political subdivision of a sovereign state exercising "perhaps the most important function of state and local governments," *Brown* v. *Board of Education*, 347 U.S. 483,

[7]Title VII first applied to Hazelwood on March 24, 1972, when the Equal Employment Opportunity Act of 1972, amending the definition of employers covered by Title VII of the Civil Rights Act of 1964 (p. 2, *supra*), was approved. 86 Stat. 113.



493 (1954), on the basis of a finding of what must be taken as unintended racially disparate results of hiring procedures. If the court properly construed Title VII and correctly applied the Act to Hazelwood, this case directly presents the question whether Title VII is constitutional as so construed and applied. The issue ultimately posed is whether Congress has authority under Section 5 of the Fourteenth Amendment to prohibit by Title VII employment practices of a state agency in the absence of proof that the practices were racially motivated. That issue was noted but expressly not decided in *Fitzpatrick v. Bitzer*, 96 S. Ct. 2666, 2671 n.11 (1976). We submit, for the reasons set forth in Part I below, that if this issue is now confronted, the Court must find the application of Title VII to the public school district in this case unconstitutional.

In Part II of the Argument we urge that, even taken on its own terms, *i.e.*, on the assumption that sanctions can be imposed on a public body for the unintended, racially-imbalanced effects of its employment practices, the decision below is wrong because the statistics on which the court relied did not indicate, much less prove, that black applicants as a group were treated any differently from white applicants as a group. When the main statistical prop of the court's decision is removed, the decision falls because at most the other evidence was regarded by the court itself as buttressing the statistical showing or as something in the light of which the statistical showing should be considered. We address ourselves in Part III to the inadequacy of other evidence, particularly evidence as to 16 asserted individual cases of discrimination against black job applicants, as independent grounds of decision.

## I. TITLE VII CANNOT CONSTITUTIONALLY PROHIBIT EMPLOYMENT PRACTICES BY AN AGENCY OF A STATE GOVERNMENT IN THE ABSENCE OF PROOF OF PURPOSEFUL DISCRIMINATION, AND THERE WAS NO SUCH PROOF HERE.

The court of appeals found a prima facie violation of Title VII by Hazelwood on the basis of statistical evidence that the percentage of black teachers on the Hazelwood faculty was smaller than the percentage of black teachers employed in all the school districts of St. Louis City and St. Louis County combined. For all practical purposes the court of appeals then converted this prima facie case into irrebuttable proof by finding that Hazelwood's hiring standards are "subjective" and, for that reason alone, that no explanation based on how those standards were applied could rebut the inference of discrimination — indeed that such an attempted explanation would corroborate rather than rebut the charge. (Pet. App. B 14b.) The court of appeals thus held that no more than a showing of racial disparity in workforce statistics is required to prove a violation of Title VII by an employer that, like Hazelwood, inevitably relies to some degree on "subjective" hiring standards. There is no need on this view of Title VII to show any purposeful discrimination.

There are two possible sources of congressional power to enact such a provision of law — the Commerce Clause and Section 5 of the Fourteenth Amendment — both of which were invoked by Congress when, as part of the Equal Employment Opportunity Act of 1972, it extended Title VII to state and local governments. *See* H.R. Rep. No. 92-238, 92d Cong., 1st. Sess. 19 (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. 11 (1971); 118 Cong. Rec. 1816, 1839-40 (1972) (remarks of Senators Williams and Javits). The Commerce Clause is not authority for Title VII in its application to state and local governments, however Title VII is construed, and Section 5 of the Fourteenth Amendment is not



authority for the Title VII that the court of appeals has applied to a local governmental body in this case.

### A. The Commerce Clause Does Not Authorize Congress To Interfere with the Hiring Practices of a State Agency.

Congress was of the view in considering the bills that became the Equal Employment Opportunity Act of 1972, 86 Stat. 103, that the extension of the employment title of the Civil Rights Act of 1964 to state and local governments could be justified, at least in part, under the Commerce Clause. That view rested on this Court's opinion in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), which had upheld application of federal wage and hour rules to state hospitals and schools. *See* S. Rep. No. 92-415, 92d Cong., 1st Sess. 11 (1971); 118 Cong. Rec. 1816, 1839 (1972) (remarks of Senators Williams and Javits).

However correct that view may have been in 1971, it was repudiated last term when the Court decided *National League of Cities* v. *Usery*, 96 S. Ct. 2465 (1976). There the Court held that application of the Fair Labor Standards Act to states, cities and counties would violate controlling principles of constitutional federalism by imposing substantial additional financial costs on those sovereign entities, thereby "directly displac[ing] the States' freedom to structure integral operations in the areas of traditional governmental functions." *Id.* at 2474.

The Court's decision was not based on any distinction between the state and local agencies that were before it in *National League of Cities*—police and fire departments—and the schools and hospitals that had been involved in *Maryland* v. *Wirtz*.

> "While there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services

which the States and their political subdivisions have traditionally afforded their citizens. We are therefore persuaded that *Wirtz* must be overruled." *Id.* at 2476 (footnote omitted).

In overruling rather than distinguishing *Maryland* v. *Wirtz*, the Court confirmed the view of the importance of public education as a governmental function that it has frequently expressed. We have quoted above from *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954) (p. 16, *supra*). In *Milliken* v. *Bradley*, 418 U.S. 717, 741-42 (1974), the Court just recently stressed the need for effective local control over this vital activity.

> "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. See *Wright* v. *Council of the City of Emporia*, 407 U.S., at 469. Thus, in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 50 (1973), we observed that local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.' "

*Compare Goss* v. *Lopez*, 419 U.S. 565, 576 (1975); *Tinker* v. *Des Moines School District*, 393 U.S. 503, 507 (1969); *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968).

If schools cannot properly be distinguished from police and fire departments in measuring the scope of Congress' Commerce Clause power, neither can the prescription of hiring practices for state bodies be distinguished from the prescription of minimum wages and maximum hours for state employees.



At the risk of overarguing what seems an indubitable point, we submit that, while the application of Title VII to state agencies does not directly impose on them increased costs like those that the court discussed in *National League of Cities*, the Court did not base its decision there on the mere fact that the Fair Labor Standards Act would increase the labor expenses of state and local governments. Rather, it based its decision on the interference with the governmental operations that would result from increased labor costs. Application of Title VII would result in comparably unjustified interference with Hazelwood's operations.

There is, to begin with, the obvious direct burden—psychological as well as physical—of the requirement that Hazelwood create extensive records and make special periodic reports to the federal government not required of other school districts. The more important direct interference, however, is the requirement that Hazelwood offer teaching positions to 16 named black applicants—14 of whom have never been interviewed by Hazelwood and the other two of whom were interviewed and rejected by Hazelwood as inferior to other candidates. (Pp. 66-73, *infra*.) A more fundamental displacement of Hazelwood's "freedom to structure [its] integral operations," *National League of Cities* v. *Usery*, *supra* at 2474, is difficult to imagine.

Potentially even more of an interference is the enforced adoption of artificially objective hiring standards. Whatever may be said about the desirability of objective standards in the hiring of non-professionals, it makes no sense to judge an applicant for a position as a teacher by any set of defined objective standards. A principal interviewing candidates to teach an elementary school class cannot just look to see who has a certificate indicating minimal qualification to teach elementary subjects, or even whose paper academic and experience credentials look best. Rather, the principal must determine who, among those with certificates, will work most successfully with his or her students, who will set the best example for the students to follow. These judgments

necessarily require assessment by the principal of what the court of appeals termed "subjective" matters: philosophy of education, ability to develop and sustain personal relationships with young people, knowledge of subject matter and capacity to communicate that knowledge, ability to inspire students, personality, poise, self control, attitude, appearance, and spirit of mutual respect. Judgments on these matters may or may not correspond with an "objective" assessment of paper credentials.

In view of the inherently subjective nature of the process of hiring teachers, the impact of the court of appeals' view of Title VII is devastating. It means that a prima facie case of statistical discrimination cannot be rebutted and thus, that if a school district faculty includes fewer members of a group protected by Title VII than a defined area "standard," the district has two alternatives: (1) immediately to engage in racially-, religiously- or sex-oriented hiring to bring its average workforce statistics up to the defined area standard, with the disregard for qualifications that must accompany such a process, or (2) remain subject to suit under Title VII on the same grounds relied upon by the court of appeals in finding a violation by Hazelwood. This choice, of course, is no choice at all, and a district in this situation would, as a practical matter, have little alternative but to hire the necessary number of black, Spanish-surnamed, Catholic or male teachers regardless of its assessment of their relative competence. Thus Congress in effect will have replaced the broadly gauged qualification standards according to which the school district would select teachers with a new standard almost exclusively geared to the requirements of Title VII. This is a grave interference with the district's freedom to structure its own operations. Under *National League of Cities* Congress derives no power from the Commerce Clause so to burden an instrumentality of state sovereignty.



### B. Section 5 of the Fourteenth Amendment Does Not Empower Congress To Prohibit Employment Practices by a State Agency in the Absence of Proof of Purposeful Discrimination, and There Was No Such Proof Here.

Congress did of course intend Title VII to interfere with the employment practices of state agencies, in laudable pursuit of Congress' responsibility to enforce under Section 5 the prohibition of discrimination contained in the equal protection clause of the Fourteenth Amendment. *See* H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 19 (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. 11 (1971); 118 Cong. Rec. 1840 (1972) (remarks of Senator Javits). Section 5 empowers Congress "to enforce, by appropriate legislation," the substantive provisions of that amendment, including the equal protection clause. In *Katzenbach* v. *Morgan*, 384 U.S. 641, 650 (1966), the Court compared the reach of congressional power under Section 5 to the scope of the necessary and proper clause, Art. I, § 8, cl. 18, and quoted Chief Justice Marshall's often repeated formulation of the latter in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819). The Court in *Morgan* also repeated from *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879), the following articulation of the scope of Section 5:

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." 384 U.S. at 650.

However sweeping the language used to describe the scope of congressional power under Section 5, the question

whether a statute is "appropriate" to enforce a substantive provision of the Fourteenth Amendment—in this case, the prohibition of racial discrimination contained in the equal protection clause—can be determined only by assessment of what state action the statute by its own specific terms prohibits or commands and what the general terms of the equal protection clause allow to be commanded or prohibited in their name. Because enforcing legislation under Section 5 directly impinges upon activities of the sovereign states, this assessment must be made in the light of the principles of federalism that are at the heart of our constitutional system.

Title VII need be read to sweep no wider than the equal protection clause itself (pp. 38-41, *infra*) and on that reading would pose no substantial issue regarding the scope of Section 5. However, as interpreted by the court of appeals, Title VII goes far beyond enforcement of the equal protection clause; broadly sweeping away state sovereignty, it may well require state agencies to violate the very principle of nondiscrimination that is the genius of the equal protection clause.

1. Proof Of Purposeful Discrimination Is Required To Establish A Violation Of The Equal Protection Clause, And There Was No Such Proof Here.

**a. Purposeful discrimination is essential to a finding that a state or state subdivision has denied to some within its jurisdiction the equal protection of the laws.**

The equal protection clause protects against intentional discrimination; it does not prohibit conduct simply because it has a disproportionate racial impact. Any doubts as to that proposition of law were stilled by this Court's decision in *Washington* v. *Davis*, 426 U.S. 229 (1976). The proposition has very recently been confirmed in *Village of Arlington Heights* v. *Metropolitan Housing Development*



*Corp.*, 97 S. Ct. 555 (1977). It seemingly commands the assent of all members of the Court.

Like this case, *Washington* v. *Davis* involved allegations of discriminatory hiring practices. Unsuccessful applicants for positions in a training program for the District of Columbia police department asked to have invalidated on constitutional grounds a requirement that they pass a standard test of verbal, reading and comprehension skills. The challenge was based solely on evidence showing that the test disqualified as a disproportionate number of black applicants; plaintiffs did not charge that the use of the test was racially motivated, or that the District had in the past purposefully discriminated against them, or any other blacks, in hiring for the police department.

Because the District is not a state, the constitutional challenge was based on the due process clause of the Fifth Amendment, which as the Court said "contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." 426 U.S. at 239. Thus, cases arising under the equal protection clause of the Fourteenth Amendment were pertinent. Those cases, the Court said, "have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." *Id.* The Court traced the relevant cases, candidly finding in some of them "indications to the contrary" of the proposition it was laying down. *Id.* at 242. The Court recognized that some lower court cases had built upon these indications by finding constitutional violations in mere disparate impacts in areas including public employment and housing. "[T]o to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation," the Court disapproved them. *Id.* at 245 & n. 12.

In *Arlington Heights* the court restated that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 97 S. Ct. at 563. It went on to suggest how such a showing can be made: it can start with impact — whether the official action in question " 'bears more heavily on one race than another,' " but except in such rare and classic instances as the blatant enforcement solely against Chinese of a municipal ordinance that invited arbitrariness in *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886), "impact alone is not determinative . . . ." 97 S. Ct. at 564. Another factor that may be significant is historical background, "particularly if it reveals a series of official actions taken for invidious purposes;" and the "specific sequence of events leading up to the challenged decision," and the "legislative or administrative history may be highly relevant . . . ." *Id.* at 564-65.

As the discussion in the *Arlington Heights* case indicates, the question we are concerned with here arises most frequently where state action is alleged to be discriminatory "even when the governing legislation appears neutral on its face." *Id.* at 564. A generation ago, the Court anticipated *Washington* v. *Davis* and *Arlington Heights* in a non-racial context, when, speaking through Chief Justice Stone, it said that "[t]he unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination." *Snowden* v. *Hughes*, 321 U.S. 1, 8 (1944).

**b. There are no findings of purposeful discrimination here and no evidence on which such findings could be made.**

Here, as in *Arlington Heights*, there is "governing legislation [that] appears neutral on its face," or, as in *Snowden* v. *Hughes*, a "statute fair on its face." The



District's hiring policy, laid down by its governing board, is unequivocal: to hire "the best possible certified persons within the financial ability of the district without considera-ation as to age, sex, race, national origin, political or religious beliefs." (P. 6, *supra*.) The court of appeals did not find that any school official or group of school officials had purposely or intentionally violated this policy by making race a consideration in the hiring of teachers. The failure to make such a finding was not a mere omission brought about by a belief that Title VII required no more than the finding of discriminatory effect that the court did make. The Government alleged a violation of the equal protection clause as well as of Title VII. (App. 4.) As a prerequisite to bringing the suit, the Attorney General had to have reasonable cause to believe that Hazelwood was engaged in a pattern or practice of resistance to full enjoyment of equal employment opportunity rights and that the pattern or practice "is of such a nature and is intended" to deny the full exercise of such rights. (P. 3, *supra*.) Intention was alleged in the complaint (App. 3-5), and government counsel promised to prove that what he thought was the relative lack of black professionals on the Hazelwood faculty was "the result of purpose." (Tr. 8.)

The court made no finding of purpose or intention on these allegations because on the record none could be made. We have said that, in holding that Hazelwood had violated Title VII, the court relied principally on the statistical disparity that it saw between the percentage of teachers in St. Louis City and County who are black and the percentage of Hazelwood teachers who are black. That is the paradigm of the evidence that this Court has said in *Washington* v. *Davis* and *Arlington Heights* is not sufficient to show a constitutional violation.[8] The court said

[8]We urge that the undifferentiated workforce data relied on below are not even good evidence of racially disparate effect, let alone

(continued)

that it considered the statistical evidence "in light of Hazelwood's hiring procedures involving the use of vague and subjective criteria . . . ." (Pet. App. B 14b.) But the existence of "vague and subjective" hiring criteria by itself is no proof of purpose to discriminate; if such criteria are to be relevant at all, it can only be on a showing that they were manipulated to the disadvantage of black applicants, and there was no such showing here. (Pp. 73-78, *infra.*) The court also said that the statistical showing was buttressed by "evidence of actual discriminatory practices in the hiring of teachers during the period prior to the effective date of Title VII and the rejection of some 16 black applicants . . . ." The evidence regarding the 16 applicants shows at most that white applicants were hired for some positions for which the 16 black applicants were no worse qualified; it is not evidence of a purpose to discriminate against the blacks, especially when, during the same period, no fewer than 15 black applicants for teaching positions were hired in preference to dozens of white rivals. (Pp. 61-78, *infra.*)

The evidence regarding Hazelwood's hiring for years prior to 1972-73 was clearly not such as would sustain or even go any distance to support a finding of purposeful and

*(continued)
of purposeful racial discrimination. (Pp. 44-60, *infra.*) Among the lower court cases disapproved by the Court in Washington v. Davis, 426 U.S. 229,245 & n.12 (1976), are cases in which the courts did not rely on the inferior evidence of general workforce statistics but, rather, measured the direct impact of challenged employment practices on minority individuals who were actually affected. *See especially* Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972). Thus, not even the best evidence of disparate racial impact, much less the once- or twice-removed evidence relied on below, suffices to show a discriminatory purpose. The decisions disapproved by the Court in *Washington* v. *Davis* also included cases involving use of "subjective" standards much like those applied by Hazelwood in its teacher hiring. *See* Wade v. Mississippi Cooperative Extension Service, 372 F. Supp. 126, 142 (N.D. Miss. 1974); United States v. City of Chicago, 385 F. Supp. 543, 560 (N.D. Ill. 1974).



intentional discrimination. The evidence was that Hazelwood did not hire a black teacher until 1969, for reasons that are not stated, but perhaps lack of applicants or rejection of offers; that in the 1960's Hazelwood did not engage in what today would be called affirmative action to encourage black application by recruiting vigorously on predominantly-black campuses; and that, in contravention of the policy of the man who was then superintendent of schools, an advertisement for teacher candidates that specified "white only" once ran in Hazelwood's name in Jackson, Mississippi, in 1962. (Pp. 10-11, *supra.*)

This is not the material from which a purpose to discriminate in hiring for the 1972-73 and 1973-74 school years could be discerned under the standards articulated in the *Arlington Heights* case and the cases cited by the Court in *Arlington Heights* for those standards. 97 S. Ct. at 564-65. This is plainly not one of those "rare" cases where standards have been so discriminatorily applied that the rule of *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886), comes into play, and this focuses the search for purposefulness on the other types of evidence referred to by the Court. There is not, as we have just noted, any "historical background" of racially motivated discrimination at Hazelwood. Unlike the school district in Denver, where for more than a decade after 1960 "the school authorities . . . carried out a systematic program of segregation affecting a substantial portion of the students, school, teachers and facilities within the school system," *Keyes* v. *School District No. 1*, 413 U.S. 189, 201 (1973), Hazelwood has never operated a segregated school. The doors of Hazelwood's schools are and have been open to blacks — teachers as well as students.

Neither is there anything suspicious about the "specific sequence of events leading up to" Hazelwood's hiring for the 1972-73 and 1973-74 school years that is under scrutiny here. Hazelwood continued in those years to select its teachers on the same careful basis that it had relied on

before in staffing its growing system. This case involves nothing even remotely related to the "sophisticated" use of voter registration requirements in Oklahoma as a "mode of discrimination" against blacks that was invalided in *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939); the "Virginia plan . . . created to accomplish . . . the perpetuation of racial segregation by closing public schools and operating only segregated schools supported directly or indirectly by state or county funds" that was struck down in *Griffin* v. *County School Board*, 377 U.S. 218, 232 (1964); or the literacy test used by Alabama as a "contrivance . . . to thwart equality in the enjoyment of the right to vote . . . on account of race or color" that was voided in *Davis* v. *Schnell*, 81 F. Supp. 872, 879 (S.D. Ala.), *aff'd per curiam*, 336 U.S. 933 (1949).[9] Finally, there is nothing in the "legislative or administrative history" of the way Hazelwood carried out its hiring practices that implicates racial motivation in any way.

Hazelwood clearly was not shown, prima facie or otherwise, to have violated the equal protection clause. The showing against it, indeed, is of the kind that this Court has held is not a showing on which a constitutional violation can be premised. The question, then, is whether Congress can say that such a showing will satisfy a statute the only constitutional authority for which is Section 5 of the Fourteenth Amendment.

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[9]Hazelwood's employment practices are equally remote from Art. I, § 26, of the California Constitution, which "encourage[d] and significantly involve[d] the State in private racial discrimination" and was invalidated in Reitman v. Mulkey, 387 U.S. 369, 376 (1967), and from the Louisiana "tax" having the "plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers" that was struck down in Grosjean v. American Press Co., 297 U.S. 233, 251 (1936).



### 2. Congress May Not Prohibit State Conduct Under Section 5 Of The Fourteenth Amendment In The Absence Of Proof Of Purposeful Discrimination.

Enforcing statutes under Section 5 include prohibitions phrased in terms of constitutional rights, administrative provisions, and specific prohibitions *not* phrased in terms of constitutional rights. No substantial question of appropriateness under Section 5 arises with respect to legislation in the first category. The Court made that point in *United States* v. *Guest*, 383 U.S. 745 (1966), where it construed a provision of one of the nineteenth century Civil Rights Acts, now codified as 18 U.S.C. § 241, making it a crime for two or more persons to conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution. The Court held that this language included rights secured by the equal protection clause and went on:

> "In this connection, we emphasize that Section 241 by its clear language incorporates no more than the Equal Protection Clause itself; the statute does not purport to give substantive, as opposed to remedial, implementation to any rights secured by that Clause. Since we therefore deal here only with the bare terms of the Equal Protection Clause itself, nothing said in this opinion goes to the question of what kinds of other and broader legislation Congress might constitutionally enact under § 5 of the Fourteenth Amendment to implement that Clause or any other provision of the Amendment." *Id.* at 754-55.

To the extent that Title VII provides a remedy for conduct of a state or local government that would be reached by the equal protection clause itself, there is no doubt that it is "appropriate" legislation within the meaning of Section 5.

Neither is there any significant question of the appropriateness of legislation when the statute being considered is administrative—that is, when the provisions involved are not themselves prohibitory but, rather, establish remedial procedures to aid in the enforcement of substantive rights that are declared elsewhere. Title VII contains many examples of such non-prohibitory provisions.[10] Like general prohibitions phrased in terms of deprivations of constitutional rights, such administrative provisions do not expand upon the substantive prohibitions of the Constitution, and their scope thus raises no constitutional question.

**a. This Court's decision in *Katzenbach* v. *Morgan* is not authority that the Section 5 enforcement power may be used to proscribe state conduct when no deprivation of constitutional rights is involved.**

When Congress acts under Section 5 to prohibit specific conduct that is not described in terms of constitutional rights, the question of appropriateness inevitably arises. When, for example, Congress determines that some specific state conduct violates the equal protection clause, Congress

[10]Title VII provisions of this sort include those that (1) create the Equal Employment Opportunity Commission with power to investigate charges, eliminate challenged practices through informal methods, and bring (or intervene in a) suit if necessary, 42 U.S.C. §§ 2000e-4 through 2000e-9; (2) provide jurisdiction for United States district courts to hear cases brought by the Equal Employment Opportunity Commission, the Attorney General of the United States, or individuals, *id.* §§ 2000e-5, 2000e-6; (3) empower district courts to enjoin employers from violating Title VII and order any appropriate equitable relief, expressly including compulsory hiring, reinstatement, and back pay, *id.* § 2000e-5(g); (4) authorize assignment of cases certified by the Attorney General to be of general public importance to three-judge district courts with direct appeal to the Supreme Court, *id.* § 2000e-6(b); (5) authorize court-appointed counsel, waiver of fees, costs, or security, *id.* § 2000e-5(f); and (6) provide for award of attorneys' fees to prevailing private plaintiffs, *id.* § 2000e-5(k).



has, by prohibiting that conduct itself, defined the terms on which the balance of the relationship between the federal government and the states is to be struck. Thus it is not the neutral judiciary that makes this important judgment, but, rather, one of the partisans in the inevitable tugging and hauling that is our federal system.

The Court has upheld congressional determinations that certain types of state action deny the equal protection of laws. It did so, for example, in the case of a criminal provision of the Civil Rights Act of 1875 prohibiting any state officer from excluding persons from juries on grounds of race, 18 U.S.C. § 243. *Ex parte Virginia*, 100 U.S. 339 (1879). The Court's approval of legislation of this sort reached its farthest limit in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). There the Court upheld under Section 5 the prohibition contained in Section 4(e) of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(e), of enforcement of New York's general English-language literacy requirement against voters educated in Spanish-speaking schools in Puerto Rico. It did so without analyzing whether, independent of the statute, the Court would itself have stricken the state's literacy requirement in that application under the equal protection clause.

The Court in *Morgan* held, however:

> "[W]e perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause." 384 U.S. at 656.

The Court noted that Congress' prohibition of the denial to Puerto Ricans educated in Spanish of the right to vote was enacted "in the context of a general appraisal of

literacy requirements for voting, see *South Carolina* v. *Katzenbach*, [383 U.S. 301 (1966)], to which [Congress] brought a specially informed legislative competence . . . ." *Katenbach* v. *Morgan*, *supra* at 655-56. In *South Carolina* v. *Katzenbach*, the Court had upheld the constitutionality of selected other sections of the Voting Rights Act of 1965, finding that "various tests and devices have been instituted with the purpose of disenfranchising Negroes, have been framed in such a way as to facilitate this aim, and have been administered in a discriminatory fashion for many years." 383 U.S. at 333-34.

The Court also held that Congress could have concluded to void New York's literacy statute under Section 5 in order to remedy discrimination against Puerto Ricans in the provision of public services. The Court so concluded because voting is, in practice, a necessary gateway through which a minority suffering from discrimination must pass in order to achieve and preserve its right to equal treatment in the provision of government services at the local level. 384 U.S. at 652-53. Once again, however, the trigger justifying congressional action was the availability of a reasonable determination that Puerto Ricans were suffering from discrimination of some variety—and this must mean invidious, purposeful, unconstitutional discrimination—in New York.

*Morgan* accordingly is fairly read to mean only that where an informed and proper basis exists for Congress to determine that specific state conduct in fact violates the equal protection clause, a congressional prohibition of that conduct may be sustained under Section 5 without this Court's having fully to satisfy itself that it would necessarily reach the same decision unaided by the congressional judgment.

In its farthest reach as an invitation to congressional action, *Morgan* has not had the generative effect that might have been expected of it. There has been concern over its



implications, but these have not been developed. Commentators particularly have wondered whether principled adherence to footnote 10 of the opinion, 384 U.S. at 651 n.10, disallowing congressional dilution of Fourteenth Amendment rights, is possible if Congress is given liberal rein to enlarge such rights.[11] The cases that will test that concern and others have not been posed or decided.

*Morgan* was a focus of the Congressional debate that preceded the enactment of the 18-year-old vote statute that was before the Court in *Oregon* v. *Mitchell*, 400 U.S. 112 (1970). Proponents of the statute, enacted as a part of the Voting Rights Act Amendments of 1970, 84 Stat. 313, asserted that it was constitutional in the light of *Morgan*. Opponents denied that *Morgan* meant that Section 5 authorized Congress to go so far. *See Hearings on S. 818, S. 2456, S. 2507 & Title IV of S. 2029 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 91st Cong., 2d Sess. (1970). *See also* 116 Cong. Rec. 6946-51, 6954-59, 6960-69 (1970). When the dispute reached the Court, the event was inconclusive. It can be said, however, that five Justices of the Court did not believe that Section 5 authorized Congress to prescribe an 18-year-old voting age for state elections.

Mr. Justice Stewart spoke for three of the five and in his opinion explained *Morgan*, we believe, consistently with the way we have tried to explain it above. He said that, even so explained, its "decisional grounds were farreaching" and that it "gave congressional power under § 5 the furthest possible legitimate reach." 400 U.S. at 296. But the three-Justice opinion denied to Congress the power claimed for it in *Oregon* v. *Mitchell* "not only to . . . eradicat[e] situations that amount to a violation of the Equal Protection Clause,"

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[11] *See, e.g.*, Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 Supreme Court Review 81, 115-34; Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 Stan. L. Rev. 603, 605-20 (1975).

which was what the *Morgan* statute did, "but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause and what state interests are 'compelling.'" *Id.*

The concern over congressional enforcement powers is peculiar to the Fourteenth Amendment and its open-ended guarantees. Could Congress, for example, write the federal Administrative Procedure Act into law for all 50 states on the ground that its study of the administrative process has persuaded it that the evolving concept of due process of law today requires no less in the way of procedural protections than the federal Act affords? The other two Civil War amendments contain enforcement provisions comparable to Section 5 of the Fourteenth Amendment, but congressional enactments drawing their authority from these provisions designed to enforce the more narrowly focused substantive provisions of the Thirteenth and Fifteenth Amendments have not produced the same close divisions of the Court or the same concern outside it. In *Oregon* v. *Mitchell*, a majority of the Court could not be mustered for the proposition that a nationwide five-year suspension of the use of literacy tests for determining eligibility to vote was sustainable as appropriate legislation to enforce the equal protection clause, but the suspension was sustained as an exercise of the power of Congress under Section 2 of the Fifteenth Amendment to enforce the very specific guarantee of Section 1 of that amendment. *See also South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); *Gaston County* v. *United States*, 395 U.S. 285 (1969). Mr. Justice Stewart, the author of the principal doubting opinion on Section 5 in *Oregon* v. *Mitchell*, is also the author of the Court's opinion in *Jones* v. *Alfred H. Mayer Co.* 392 U.S. 409 (1968), which revivified Congress' power under Section 2 of the Thirteenth Amendment to enforce the abolition of slavery by eliminating all the badges and incidents of slavery, in the case then at hand by forbidding



discrimination against blacks in the sale of property through Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1982.[12]

Conceivably, in the light of its heightened concern to guard against unjustified incursions on state sovereignty, *see, e.g., National League of Cities* v. *Usery*, 96 S. Ct. 2465 (1976); *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 97 S. Ct. 583 (1977), the Court will wish to consider whether *Morgan* has taken it farther than it should properly go in allowing congressional intrusion into state affairs. The Court, however, need not undertake any reconsideration of *Morgan* in order to decide this case, for Title VII cannot pass muster even under *Morgan's* broad definition of the scope of Section 5. In the first place, Title VII's general prohibition of discrimination in employment practices is wholly unlike the narrow prohibition considered in *Morgan*, where the statute had been precisely drawn to deal with a specific situation in which Congress believed that Puerto Ricans were being denied the equal protection of the laws. Moreover, irrespective of what Congress intended Title VII to do, there is no basis to sustain its application here, where it is beyond doubt that there was no purposeful denial of equal protection. Finally, the disheartening irony of Title VII as interpreted and applied by the court of appeals is that it may very well compel more discrimination than it remedies.

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[12] *See also* Runyan v. McCrary, 96 S. Ct. 2586 (1976); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975); Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 431 (1973); Griffin v. Breckenridge, 403 U.S. 88 (1971); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). Congress also "has power to fix the terms on which its money allotments to States shall be disbursed," Lau v. Nichols, 414 U.S. 563, 569 (1974), but the spending power is not involved in this case.

**b. Congress intended the substantive prohibitions of Title VII to be no broader than the scope of the equal protection clause.**

*Morgan* dealt with the legitimacy of a narrow provision aimed by Congress at carefully defined state action, a particular application of New York's voter eligibility laws, which had been closely examined for its tendency to bring about invidious discrimination against Puerto Ricans, United States citizens who had been educated under the American flag in their own language. Congress concluded that application of New York's literacy statute had to be restricted in order to protect Puerto Ricans from just such discrimination. Title VII, on the other hand, as originally enacted and as amended to apply to public agencies, was the broadest of reform measures. It covered a multitude of situations involving the hiring, firing and promotion of all who might be adversely affected if their race, color, religion, sex or national origin were considered. Congress focused on nothing even so specific as, for example, the possibility that subjective hiring criteria for teachers might be used to discriminate against blacks. It did not find that all employment practices that produce a disparate racial impact, regardless of the presence or absence of racial motivation, are in fact used as "instruments of invidious discrimination," *Oregon* v. *Mitchell*, 400 U.S. 112, 296 (1970) (opinion of Stewart, J.), or that they must be prohibited in order to deal with some other denial of equal protection.

What Congress meant to do when it came to apply Title VII, enacted in 1964 as part of the Civil Rights Act of that year, to state and local governments was to provide new remedies for substantive standards to which those governments were already subject. Congress understood when it extended Title VII to state agencies that the substantive prohibitions of the Act were no broader than those of the equal protection clause. That understanding is of the ut-



most significance because by the time the Equal Employment Opportunity Act of 1972 was enacted, *Katzenbach* v. *Morgan* had been decided and the way might have been thought open to enlarge the substantive prohibitions. Indeed, *Katzenbach* v. *Morgan* was discussed at length during debate on the bills that became the Equal Employment Opportunity Act of 1972, *see* 118 Cong. Rec. 4485-92 (1972), and was specifically cited as authority empowering Congress to enact legislative prohibitions under Section 5 broader than those of the equal protection clause itself. *Id.* at 4485 (remarks of Senator Ervin). Nevertheless, the proponents of the bills declined to embrace the broad proposition for which *Katzenbach* v. *Morgan* had been cited and did not even refer to the case as authority for the proposed legislation.

The cognizant Senate committee said:

> "The Constitution is imperative in its prohibition of discrimination by State and local governments. The Fourteenth Amendment guarantees equal treatment of all citizens by States and their political subdivisions, and the Supreme Court has reinforced this directive by holding that State action which denies equal protection of the laws to any person, even if only indirectly, is in violation of the Fourteenth Amendment. It is clear that the guarantee of equal protection must also extend to such direct action as discriminatory employment practices." S. Rep. No. 92-415, 92d Cong., 1st Sess. 10 (1971).

The other relevant committee report is to the same effect, H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 18-19 (1971), and in Senate floor debate two principal advocates of extending Title VII to state and local governments, Senators Williams and Javits, stated their understanding that the equal protection clause already protected employees of state agencies against discrimination. 118 Cong. Rec. 1816, 1840 (1972).

To be sure, *Washington* v. *Davis* had not been decided when the bills that became the 1972 Act were under consideration. However, the doctrine stated in *Snowden* v. *Hughes*, 321 U.S. 1, 8 (1944), that there must be present "an element of intentional or purposeful discrimination" to make out a denial of the equal protection of the laws was familiar and was unimpaired by any decision of this Court. For those legislators familiar with the law of the equal protection clause, that doctrine provided the background against which they legislated explicitly to provide more effective remedies for equal protection violations affecting public employees. Those legislators were aware of a 1969 report of the Civil Rights Commission, which at one point suggested a broader view of the scope of the equal protection clause than any decision of this Court warranted. The Commission said that "[u]nconstitutional practices include not only those which are purposefully discriminatory, but also those which have the effect of creating or reinforcing barriers to equal employment opportunity." *See* 118 Cong. Rec. 1817 (1972). But the responsible committees quoted not that ambiguous and possibly misleading passage but rather what the report had to say of conscious, purposeful discrimination:

> "Not only do State and local governments consciously and overtly discriminate in hiring and promoting minority group members, but they do not foster positive programs to deal with discriminatory treatment on the job." H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 18 (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. 10 (1971).

The foregoing discussion suggests a narrowing construction of Title VII, at least in its application to state and local governmental bodies, that would avoid the constitutional doubts that attend the court of appeals' construction.[13] More significantly for the question of con-

[13]In addition, § 707(a), under which this suit was brought, indicates that in a suit by the Attorney General against a public body (or anyone else) (continued)



stitutionality that is presented on this writ, the discussion establishes that this Court cannot justify a decision sustaining the court of appeals' Title VII as appropriate judicial deference to an informed congressional judgment that unintended racial (or other) disparities resulting from the employment practices of state and local governments should be subject to federal sanctions. Congress made no such judgment. As Mr. Justice Stevens suggested in his con-

[13](continued)
intentional discrimination must be shown. Such a suit cannot be instituted unless the Attorney General first has reasonable cause to believe that someone is engaging in a pattern or practice of resistance to the full enjoyment of Title VII rights and reasonable cause to believe also that "the pattern or practice is of such nature and *is intended* to deny the full exercise of" such rights. (Emphasis supplied.) Under § 707(a) the Attorney General may request injunctive and other relief in a district court "against the person or persons responsible for such pattern or practice," *i.e.*, a pattern or practice intended to deny the full exercise of Title VII rights.

We would add that, although it has been assumed in opinions of this Court that mere disparate treatment of blacks (or others entitled to the protection of Title VII) in employment practices suffices to make a case under Title VII, *see* General Electric Co. v. Gilbert, 97 S. Ct. 401, 408-09 (1976); Washington v. Davis, 426 U.S. 229, 246-47 (1976), no decision of this Court so holds. In Griggs v. Duke Power Co., 401 U.S. 424 (1971), there was a long history of blatantly discriminatory practices, and the effect of these was frozen by the challenged testing and educational requirements; this was an application of very traditional remedial law, like Wright v. Council of the City of Emporia, 407 U.S. 451 (1972), discussed in Washington v. Davis, 426 U.S. 229, 243 (1976). Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), is comparable to *Griggs*. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court held that Green could prevail only if he could prove that McDonnell Douglas' asserted reason for not rehiring him was only a pretext—"in fact a coverup for a racially discriminatory decision." *Id.* at 805. In Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973), the Court held that, even though a policy of not employing aliens had a disproportionate impact on persons born abroad and thus might fairly be thought to relate to national origin, Title VII was not violated because it does not prohibit discrimination against aliens. Thus, the undoubted purposeful discrimination was not within the terms of the statute, and the unintended discriminatory effect, though implicating a form of job discrimination affected by the statute, was not within its reach.

curring opinion in *Fitzpatrick* v. *Bitzer*, 96 S. Ct. 2666, 2672 (1976), — he was "not sure that the 1972 Amendments were 'needed to secure the guarantees of the Fourteenth Amendment,' " — a case involving application of Title VII as construed below to a state agency such as Hazelwood is a world away from *Morgan*.

**c. There was no denial of the equal protection of the laws here under controlling decisions of this Court and no room for a contrary congressional judgment.**

In *Morgan* the Court did not itself decide whether New York's English literacy requirement violated the equal protection clause, or whether Puerto Ricans there were suffering other unconstitutional denials of equal treatment in the provision of local services. The Court suggested, however, that it might well have answered these questions in the affirmative. Congress, in Mr. Justice Stewart's later words, was eradicating a situation that amounted to a violation of the equal protection clause. Here, on the other hand, Hazelwood has been found in violation of Title VII without proof of any purposeful discrimination. The conduct in this case is conduct that, on the basis of this Court's very fresh precedents, does not violate the equal protection clause. In the light of those precedents, the Court cannot find that Congress could reasonably have determined that the conduct is violative of the equal protection clause.

It is highly relevant that, although the courts have broad-ranging remedial powers to enforce constitutional rights, *compare Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), in attempting to eradicate a denial to students of the equal protection of the laws, they may not invoke that power to interfere with the operation of a school district that has itself not purposefully engaged in unconstitutional conduct. *Milliken* v. *Bradley*, 418 U.S. 717 (1974). *See also Rizzo* v. *Goode*, 423 U.S. 362 (1976). There is no occasion for remedy where there is no constitutional violation.



**d. Title VII as construed below encourages discrimination and therefore cannot be "appropriate legislation to enforce the equal protection clause.**

Title VII as applied below diverges sharply from the nondiscrimination principle of the equal protection clause and therefore cannot be, within the terms of Section 5, appropriate legislation to enforce the Fourteenth Amendment. In that application, Title VII requires Hazelwood to engage in racially oriented hiring, not to remedy a past constitutional wrong but because its faculty has fewer blacks than an outside measure suggests that it should have. How can a statute that in practice requires school districts such as Hazelwood to hire expressly on the basis of race, religion, sex or national origin be consistent with the requirement, as stated in *Morgan*, 384 U.S. at 650, that enforcing legislation under Section 5 must tend to "secure *to all persons* . . . the enjoyment of equal protection of the laws"? (quoting *Ex parte Virginia*, 100 U.S. 339, 345 (1879)) (emphasis supplied). When a court requires such a district purposefully to hire blacks, Catholics, Mexican-Americans or men — irrespective of how their qualifications compare with those of competing applicants — what remains of the requirement of the Constitution that the equal protection of the laws be secured to *all*, including those who have necessarily been excluded in order to accommodate the district's consciously discriminatory hiring?

The congressional prohibition of the New York English literacy requirement that was before the Court in *Morgan* was required to deal with a denial of equal protection of laws but even then did not compel New York to make any conscious distinctions among its citizens and favor some over others. There the statute added Puerto Ricans to New York's voting rolls, without requiring any compensating removal of members of some other class. Here, by contrast, Hazelwood has not violated the equal protection clause, yet it must allocate among competing applicants jobs that are

scarce resources. Teaching positions cannot be expanded at will, like lists of eligible voters; one applicant's acceptance is a refusal for scores of others.

The short of it is that Title VII cannot constitutionally be interpreted and applied to a public body as it was by the court of appeals here.

## II. SINCE HAZELWOOD'S HIRING PRACTICES WERE DIRECTLY SHOWN NOT TO EXCLUDE A DISPROPORTIONATE NUMBER OF BLACK APPLICANTS, COMPARATIVE WORKFORCE STATISTICS, FAULTY IN ANY EVENT, CANNOT SUSTAIN A FINDING OF A VIOLATION OF TITLE VII.

In this part of our Argument we assume, contrary to what we have contended above, that unintended racially disparate consequences of hiring practices are sufficient as a matter of statutory and constitutional law to make out a violation by a public body of Title VII of the Civil Rights Act. We undertake here to demonstrate that no such consequences were shown on the record and that, indeed, the record shows that Hazelwood has been hiring proportionally more blacks than whites as teachers.

The court of appeals ignored the evidence that black applicants for faculty positions at Hazelwood were hired at a rate well in excess of the rate for white applicants. It held that, given what it perceived to be the nature of Hazelwood's hiring process, a prima facie case of unlawful discrimination was established by evidence that the proportion of Hazelwood's teaching staff that was black was substantially below the black proportion of the overall teacher workforce employed in St. Louis City and St. Louis County combined. (Pet. App. B 14b.) The court erred in relying on this comparison when direct evidence of Hazelwood's hiring practices was available, and in any event the comparative workforce statistics relied on by the court were so flawed as to be useless.



### A. Since the Record Showed the Rate at Which Hazelwood Hired Black Applicants and That Rate was Higher Than the Rate at Which It Hired Applicants Generally, Reliance on Area Workforce Statistics Was Unwarranted.

The statutory issue raised by the Government's suit is whether Hazelwood used employment practices prohibited by Title VII in its selection of new teachers from among those persons who were available for employment. The obvious primary source of proof in respect of such a charge is evidence as to the employer's treatment of persons actually identified as available to be hired. Proof of a racially representative workforce composition would not overcome a showing of racial discrimination in the treatment of an individual applicant for employment. Likewise, failure to employ the same proportion of minority employees as does another employer or group of employers proves nothing if the employer whose practices are challenged treats all applicants fairly and without regard to race.

No court has ever construed, and Congress clearly never intended, Title VII to impose on a public employer an obligation to conduct an affirmative hiring program designed to replicate in the employer's own workforce the composition of the local labor market. "A public employer may constitutionally take its applicants as it finds them." *Castro* v. *Beecher*, 459 F.2d 725, 733 (1st Cir. 1972). In appraising the lawfulness of an employer's hiring practices under Title VII, the question is whether those practices select individuals "in a racial pattern significantly different from that of the *pool of applicants.*" *Cf. Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975) (emphasis supplied).

Statistical evidence may be used to measure the impact of employment practices. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 & n.7 (1971). But "statistics must not be accepted uncritically, without careful consideration of all

relevant factors." *Logan* v. *General Fireproofing Co.*, 521 F.2d 881, 883 (4th Cir. 1971). Particularly in dealing with questions involving the employment of a select group such as qualified professional educators, it is necessary that statistical data be very carefully refined. *See, e.g., Chance* v. *Board of Examiners*, 330 F. Supp. 203, 214 (S.D.N.Y. 1971), *aff'd*. 458 F.2d 1167 (2d Cir. 1972). Where professional hiring is involved and the "pool of applicants" can be determined precisely, it is the experience of those persons who make up the pool — not a hypothetical group of potential applicants — that must be examined.

There are, to be sure, some situations in which an employer's compliance with the demands of Title VII is properly measured by reference to labor market statistics. In a case of alleged discrimination in hiring, labor market composition may be considered where the racial breakdown of the employer's actual applicant flow is unknown; area statistics can serve as a surrogate means of calculating the number of minority group members that are likely to apply or be available for employment. And it may be appropriate to refer to area workforce statistics where an employer, rather than passively receiving job applications, tries to induce or discourage applications from some sources; in such a situation, it may be asserted that the employer has manipulated the racial composition of its applicant flow and thereby rendered inadequate an analysis restricted to its treatment of actual applicants.

Where the racial composition of an employer's applicant flow is known, where the effect of the employer's practices in handling the flow can be directly measured, and where there is no evidence that the employer has manipulated that flow so as to reduce minority representation, that employer cannot be found to have violated Title VII simply because minority group members are not represented in its workforce to the extent that they are represented in other employers' workforces. This, we submit, is Hazelwood's case.



There is evidence as to the racial composition of Hazelwood's applicant flow. There is evidence that Hazelwood's practices in regard to its job applicants are neutral in character (*i.e.*, not racially based) and that those practices do not operate to exclude black applicants from employment in disproportionate numbers. There is no evidence that Hazelwood discourages black applications in the first instance or that any past discouragement — and none was shown — affected the number of black applicants since 1970 or, particularly, since Title VII was amended to reach Hazelwood in 1972.

The relevant data are not complicated:

For the 1971-72 school year, there were 3,127 applicants for 234 teaching positions at Hazelwood; for 1972-1973, Hazelwood hired 282 of 2,373 applicants. (Pet. App. A 4a.) Thus, Hazelwood hired only 7.5 percent of all applicants for 1971-72 and 11.9 percent for 1972-73 — a two-year average of 9.4 percent.[14]

As for the hiring rate for black applicants, there was a net increase of 16 in the number of black teachers and other professionals at Hazelwood from 1970 to the start of the 1973-74 school year.[15] And it is known that at least one

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[14]The record also shows that Hazelwood hired 123 new professional staff members for 1973-74 (Pl. Ex. 55) but does not disclose how many persons applied for jobs for that year, although at the time of trial in March 1974, there were 2300 applications on file (Tr. 38).

[15]The record as to these matters, which consists of Hazelwood's submissions to the Department of Health, Education and Welfare and the Equal Employment Opportunity Commission, shows faculty figures for 1970-71, 1972-73 and 1973-74. (Pl. Ex. 55.) There were six black professional employees — apparently all teachers — in 1970-71 and 22 black professional employees in 1973-74. Apparently until 1973 faculty figures were submitted to the Government agencies only every two years. In the Statement (p. 8, *supra*) we have stated the number of black teachers on the Hazelwood faculty in 1971-72 as shown in

(continued)

other black applicant was offered a job but had already accepted another position.[16]

The Government, after an exhaustive FBI search of Hazelwood's records, offered an exhibit that originally identified 61 persons alleged to have been unsuccessful black applicants for teaching jobs in the Hazelwood District in 1971-72, 1972-73 and 1973-74 — mostly the latter two years. As corrected before being introduced, the exhibit (Pl. Ex. 49) identified 54 applicants, but one of these was the applicant who was offered a job and another was among those hired. As we will explain (see p. 67, *infra*), at least four of the remaining 52 either applied for nonexistent positions or did not possess even the minimum credentials required for the jobs they sought; therefore, no more than 48 eligible but unsuccessful applicants were identified. Sixty-five blacks have thus been identified as having applied for professional faculty positions for school years 1971-72 through 1973-74: 48 who were unsuccessful, 16 who were offered positions and accepted them, and one who declined an offer from Hazelwood. Accordingly, it appears that job offers were made to as many as 26.2 percent of black applicants.[17] Even if another 30 blacks, not identified at trial, applied for the 1971-72 school year — an implausibly high number since some applicants for that year are already included in the list of 65 known applicants and the number of black applicants has apparently grown each year — the hiring rate for the three-year period would still be 17.9 percent.[18]

[15](continued)
Hazelwood's records and have made substantially the same calculations as appear in the text here but somewhat simplified. Here we confine ourselves to the record figures.

[16]The applicant who had accepted another offer was Reid. (Tr. 193-94.) There may, of course, have been other such cases.

[17]*I.e.*, 17 divided by 65.

[18]*I.e.*, 17 divided by 95. Moreover, even if there were not 95 but twice that many black applicants — an impossibly high number, given the
(continued)



At least since 1971, then, it appears that blacks who have applied for teaching positions at Hazelwood have been hired at a rate substantially in excess of the rate at which applicants generally have been hired. Because there is no evidence that during this period Hazelwood either discouraged blacks from applying or sought non-black applicants in disproportionate numbers or that there were lingering effects of any past failures to encourage black applications, the relative rates of hire are the proper index to Hazelwood's treatment of its black applicants. A gross comparison of Hazelwood's proportion of black teachers with the proportion in even the most relevant labor market is neither warranted nor useful.

### B. Even If Hazelwood's Hiring Practices Are Considered in Light of Area Workforce Statistics, It Is Clear That Those Practices Have Not Resulted in a Disproportionate Exclusion of Blacks.

The court of appeals' fundamental error in disregarding data reflecting Hazelwood's actual treatment of black job applicants in favor of workforce statistics is discussed in the preceding section of this part of our Argument. Even if workforce statistics were somehow relevant here, the court of appeals' selection and analysis of these data are flawed in three major ways.

First, the court, overruling an express finding of the district court, held that the appropriate labor market against which Hazelwood's hiring should be compared was the combined teacher employment of the City of St. Louis and St. Louis County. Second, the court of appeals simply ignored the drastic effect on area workforce figures of the hiring practices of the City of St. Louis, whose adherence to

[18](continued)
apparent thoroughness of the FBI search — the hiring rate would still be 8.9% (*i.e.*, 17 divided by 190).

a racial hiring quota both inflates the proportion of black teachers of the City-County labor market and diverts to the City school system black applicants who might otherwise be available to small outlying districts such as Hazelwood.[19] Finally, the court of appeals compared the inflated minority workforce statistics of the City and County, not with Hazelwood's post-1972 hiring, but rather with Hazelwood's overall workforce composition, which was largely the product of experience prior to the amendment of Title VII in 1972.

In short, the court of appeals found a prima facie showing of discrimination in violation of Title VII on the basis that Hazelwood failed to conduct its hiring so as to replicate the racial composition of an arbitrarily selected measuring group, which was itself largely affected by the racially oriented, preemptive hiring practices of a single dominant employer. The court's analysis is obviously unsound for all the foregoing reasons. If an analytically valid comparison is made between Hazelwood and other employers, it becomes apparent that Hazelwood's hiring practices have, at least since Title VII became applicable to it, resulted in the hiring of blacks substantially in proportion to black representation in the appropriate measuring group.

[19]The City's hiring practices are described at p. 52, *infra*.



### 1. Hazelwood Has, Since Title VII Became Applicable To It, Hired Black Teachers Substantially In Proportion To The Black Share Of The Pool Of Applicants In The Labor Market Who Are Reasonably Available For Employment By Hazelwood.

The court of appeals compared the percentage of Hazelwood's workforce that is black with the black percentage of the workforce in a labor market defined by the court as the City of St. Louis and St. Louis County. It found a disparity sufficient, in light of Hazelwood's hiring procedures as the court understood them, to create a prima facie case of unlawful discrimination. In selecting the appropriate labor market, the court of appeals simply rejected the contrary holding of the district court (Pet. App. A 18a-19a) and decided that, since a majority of the teachers hired by Hazelwood for 1972-73 resided in that geographical area, it should be presumed that all teachers residing in that area are available for and interested in employment by Hazelwood (Pet. App. B 10b n.7).[20] The court erred in its selection of the appropriate labor market. Moreover, its treatment of the available statistical evidence pertaining to the labor market that it did select was also erroneous. As the following discussion will make clear, even using the labor market definition adopted by the court of appeals, the black proportion of the area workforce available for employment by Hazelwood is possibly 4 percent and in no event more than 6 percent. Moreover, since Title VII

[20]The source of the residence figures relied on by the court of appeals is obscure. Such evidence as the record contains suggests that while a distinct majority of the teachers hired by Hazelwood resided in the City-County area when they applied for teaching positions, the school district in fact attracts applicants from nearby southern Illinois and other states. Of the 16 unsuccessful job applicants as to whom the court of appeals found discrimination, four (Carson, Triplett, and the two Wilsons) resided out of the designated area and two others (Novel and Smith) were attending college in Minnesota when they applied.

became applicable to Hazelwood, between 3 and 4 percent of Hazelwood's new teachers have been black. Correctly analyzed, therefore, the statistical comparison shows not a disparity in minority hiring but rather substantial equivalency in treatment for presumed job applicants. It follows that a prima facie showing of discrimination cannot, in Hazelwood's case, be founded on the results of statistical analysis of workforce data.

**a. The pool of applicants**

The court of appeals, noting that of the 19,425 employed teachers in St. Louis City and County in 1970,[21] 2,997 (15.4 percent) were black,[22] concluded that the black share of the labor market — against which Hazelwood's hiring would be measured — was 15 percent. (Pet. App. B 10b.) The court failed to carry its analysis the necessary next step. A comparative workforce analysis depends on the inference that the labor market workforce composition is representative of those individuals who are in competition for the positions at issue; where the composition of the labor market workforce is not representative of presumed applicants, the data must be adjusted before any comparisons can be made.

The most significant adjustment required here is the exclusion of the impact of the racially-based teacher hiring practices of the City of St. Louis on the area averages. The St. Louis City school system maintains a teaching staff that is approximately 50 percent black. (App. 94-95.) Indeed, it recruits aggressively in order to meet its goal (App. 92-93) and selects teachers by race to fill vacancies as they occur (App. 96). The City's 50 percent quota is not determined by reference to the composition of the labor market workforce or the group of actual applicants for City school positions; rather, it represents what the City perceives to be a

[21] 1970 Census Tables 86 & 122. (App. 409-10.)

[22] 1970 Census Tables 93 & 127. (App. 409-11.)



desirable accommodation to the composition of the City's population (40.8 percent black)[23] and its public school enrollment (65-70 percent black). (App. 94-95; Tr. 333, 352.) In 1970, reflecting the City school system's hiring practices, 41.7 percent of the teachers living in the City of St. Louis were black. And of the 2,997 blacks employed as teachers in the combined City and County area, 2,182 — a 72.8 percent share — lived in the City. The County's 815 black teachers amounted to only 5.7 percent of the teachers living in the County.

There are not enough potential black teachers in the St. Louis City and County area to allow the City to maintain a teaching staff that is 50 percent black and also permit the outlying districts to increase the black representation on their faculties appreciably. Although in 1970 blacks constituted 19 percent of the combined City and County population,[25] only 6.4 percent of the City-County population with at least four years of college—clearly an unobjectionable minimum qualification for public school teachers — was black.[26] Moreover, one of every two black persons in the City-County area with four years or more of college was already employed as a teacher in 1970.[27]

[23] 1970 Census Tables 81 & 91. (App. 408-09.)

[24] The 1970 Census shows that of the 19,425 employed teachers in the City and County, 2,997 (15.4%) were black (see notes 21 & 22, *supra*). The City figures were 2,182 of 5,238 (41.7%) (App. 409-10); the County statistics 815 of 14,187 (5.7%) (App. 410-11). If only 15% (786 of the 5,238) teachers in the City had been black, the City-County average would have been only 8.2% black (1601 of 19,425).

[25] 299,847 of 1,573,587 inhabitants were black. (Census Tables 81 & 119; App. 408, 410.)

[26] Of 92,733 inhabitants with at least four years of college, only 5,946 were black. (Census Tables 120 & 125; App. 410-11.)

[27] Of 5,946 blacks with at least four years of college, 2,997 (50.4%) were employed as teachers. (Census Tables 91, 93, 125 & 127; App. 409-11.) In contrast, only 16,428 of 86,787 non-blacks (18.9%) with equivalent education were employed as teachers. (Census Tables 86, 93, 120, 122 & 127; App. 408-11.)

The population of St. Louis County was only 4.8 percent black in 1970.[28] Blacks constituted only 1.9 percent of the County's college-educated population,[29] and, as in the City of St. Louis, half of those persons were already employed as teachers.[30]

The City's racially-based hiring practices — to which the Government takes no exception and, indeed, which it appears to endorse[31] — combine with these demographic facts to render impossible of achievement the racial distribution evidently contemplated by the court of appeals. Using 1970 figures, if 50 percent of the teachers in the City of St. Louis had been black, and 15 percent — instead of 5.7 percent — of the County's teachers had been black, there would have been 4,747 black teachers out of a total of 19,425 teachers in the area.[32] This would mean not only that nearly a quarter of all teachers would have been black (compared with the 6.4 percent black proportion of those who have completed four years of college), but also that four-fifths of all blacks with at least four years of college would have been employed as teachers.

It is apparent that, as long as the City of St. Louis adheres to its quota hiring practice, the remaining school districts

[28]45,579 of 951,353 inhabitants were black. (Census Tables 119 & 125; App. 410-11.)

[29]1,598 of 82,529 inhabitants with 4 years of college were black. (Census Tables 120 & 125; App. 410-11.)

[30]815 of 1,598 (51%) were teachers. (Census Table 125; App. 411.)

[31]There is, to be sure, a bizarre touch to the Government's use of an official of the City of St. Louis school district — which deliberately restricts its hiring of non-blacks to a level well below their 85% average area workforce composition, regardless of their representation among actual applicants — as part of an effort to prove that Hazelwood discriminates against blacks by hiring actual black applicants at twice the rate at which it hires whites.

[32]The City's 50% quota would yield 2,619 black teachers out of 5,238; the County's 15% representation would yield 2,914 out of 14,187.



in the City-County area must share an artificially restricted portion of potentially qualified black teachers. Conversely, the heavy draw by St. Louis on the pool of college-educated blacks suggests that the job-seekers — that is, unemployed teachers or those not content with their present situations — are disproportionately likely not to be black.[33]

In addition to skewing the labor market statistics, the practices of the City of St. Louis appear to have other effects on the ability of other County school districts to hire qualified black teachers. The evidence established that one of the major sources of new black teachers in the area is Harris Teachers College, whose graduating class in 1973 was 60 percent black. (Tr. 166.)[34] But Harris is operated by the school system of the City of St. Louis, which in consequence occupies an advantageous position in the recruitment of Harris graduates; according to the City's director of personnel, the City hires "most" of the black Harris graduates (Tr. 336), and the City's school principals have ample opportunity to scout and recruit the "better ones" (*id.*). The City thus diverts blacks who might otherwise apply for employment at County school districts such as Hazelwood.

Finally, the nature of the labor market in the teaching profession suggests that it is wrong to assume — as the court of appeals necessarily did — that all presently employed teachers in the City-County area are potential Hazelwood employees. There is, first, no reason to assume a total job mobility within the area; it is the City of St. Louis,

[33]Of the City-County area's 73,308 inhabitants with at least four years of college who were *not* employed as teachers in 1970, only 2,949 were black — a representation of only 4%. In St. Louis County alone, of the 68, 342 college-educated inhabitants not employed as teachers, only 783 — or 1.1% — were black.

[34]The court of appeals believed that Harris was one "of the two predominantly black colleges in Missouri." (Pet. App. B 4b.)

not outlying Hazelwood,[35] that is at the center of the regional transportation network. And it is characteristic of the teaching profession that job mobility is not common, particularly among more experienced teachers and particularly in times like the present, when the supply of teachers exceeds the demand for them. Additionally, there is evidence that at least in some specialty areas Hazelwood's standards for employment are higher than those used by other districts in the region; the evidence shows, for example, that Hazelwood requires its business education teachers to have vocational certificates in that field, while some other districts do not.[36] Moreover, Hazelwood does not offer employment in all educational fields: special education, for example, is conducted for all St. Louis County districts at a central facility, and Hazelwood consequently employs no special education teachers. (Tr. 83-85.)

**b. Hazelwood's hiring**

For the 1972-73 and 1973-74 school years, Hazelwood hired 405 new employees,[37] while the District's black professional staff increased from seven to 22 (a net increase of 15). (Pp. 7-8 & n.3, *supra*.) If the number of blacks hired was no greater than the net increase, then 3.7 percent of Hazelwood's new hires for the period were black.[38] For 1973-74 alone, five of Hazelwood's 123 new hires were black — a rate of 4.1 percent. (Pl. Ex. 55.)

[35]Hazelwood shares a short common boundary with the City of St. Louis but primarily serves an area of St. Louis County that was predominantly rural and undeveloped until the 1960's and has only recently been subjected to the pressures of suburban growth.

[36]*E.g.*, Tr. 49, 64. Applicants Ealy (who lacked such a certificate) and Catlin (who lacked a similarly required vocational home economics certificate) both obtained positions in St. Louis City schools. (Tr. 52, 218.)

[37]282 for 1972-73 and 123 for 1973-74. (Pet. App. A 4a; Pl. Ex. 55.)

[38]*I.e.*, 15 divided by 405.



Since blacks constitute only 6.4 percent of the City-County population with at least four years of college, only 4 percent of the college-educated City-County population not already employed as teachers, only 5.7 percent of the St. Louis County inhabitants employed as teachers, and only 1.1 percent of the County's college-educated population not already employed as teachers, Hazelwood's black hiring rate of not less than 3.7 percent is not only not disproportionately low but is even substantially equivalent to the composition of a group consisting of those persons most reasonably assumed to be available for employment at Hazelwood.

2. **Since Hazelwood Has Hired Black Teachers Substantially In Proportion To The Black Share Of The Pool Of Those Available For Employment, The Fact That Hazelwood's Overall Teacher Workforce Includes A Lower Proportion Of Blacks Than Are Employed As Teachers In The Labor Market Is Not Evidence That Hazelwood Discriminated In Hiring.**

Since the statutory issue presented in this case is whether Hazelwood discriminated against blacks in hiring after Title VII became applicable to it in 1972, the court of appeals erred in measuring Hazelwood's conduct by using statistics that commingle the results of pre-1972 and later hiring. The practical effect of comparing the number of black teachers in 1973-74 (22) with total faculty at that time (about 1200) is to base a finding of discrimination in hiring for the 1972-73 and 1973-74 school years on the fact that Hazelwood employed only six blacks out of approximately 1,000 professional staff members in 1971, the year before Title VII applied to Hazelwood. (Pl. Ex. 55.)[39] That is no

[39]The court of appeals considered it significant that Hazelwood employed its first black teacher in 1969 (Pet. App. B 9b), but the court

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proper basis for such a finding. The employment practices Hazelwood used in hiring the teachers who were staff members in 1971 could be relevant as evidence of a violation of Title VII in later years only if Hazelwood purposefully discriminated against blacks in the earlier years — in contravention of the equal protection clause — and if its non-racially motivated employment practices beginning in 1972 served somehow to perpetuate the effects of the past purposeful discrimination. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Neither standard is met here.

In the first place, there is neither direct nor indirect proof here of any purposeful discrimination by Hazelwood. There is no evidence what proportion of applicants for jobs at Hazelwood were black before 1971-72. The evidence depicts a small rural school district being overtaken by suburban growth in the 1960's and 1970's. The evidence shows that no blacks resided in the district for many years; and it is not unreasonable to infer that black teachers did not make application to Hazelwood during that period.[40] Moreover, it must be recalled that, as the evidence shows, teachers were in great demand during the 1960's; and the present-day pattern of job-seeking, well illustrated in the record of this case, simply did not exist. In short, there is every reason to believe that Hazelwood did not receive applications from significant numbers of blacks prior to 1972, and no evidence to the contrary. There is certainly no evidence in the record that Hazelwood ever rejected an actual black applicant for reasons of race.

[39](continued)
overlooked evidence that Hazelwood had earlier made job offers to black applicants that had not been accepted (App. 52).

[40]Hazelwood had no occasion to maintain a dual school system and cannot fairly be made to bear consequences of other districts' having done so.



Surely the mere absence of black teachers from a school district that had few or no black students; a failure to recruit at predominantly black schools; a stray newspaper advertisement in 1962 for whose discriminatory contents the District may or may not be responsible; and the possible use of some old application forms bearing racial identifications do not add up to purposeful discrimination such as would justify a finding that Hazelwood had denied to black teacher applicants the equal protection of the laws before 1972.

Equally importantly, even if a court could find invidious discrimination by Hazelwood prior to 1972, which we vigorously dispute, there is no issue here about perpetuation of any effects from those earlier years. This is a case involving present hiring practices only — there is no issue here about seniority rights, transfer opportunities or promotions; the effects of discrimination in those areas have a high potential for persistence. On the other hand, a 1962 newspaper advertisement or a failure to visit a predominantly black college campus in 1964 has no logical effect on (1) whether a black prospective teacher will apply for a job in 1972, 1973 or 1974 or (2) how his application will be handled if he does apply.

The analysis of the court of appeals should also be rejected because to hold that a prima facie showing of discrimination is created by Hazelwood's failure to equal the average area workforce composition is to make the showing irrebuttable; there were simply not enough qualified black applicants. Even if Hazelwood had hired every willing and minimally qualified black applicant for a teaching position prior to the trial in early 1974, the District's teaching staff would have included no more than 70 blacks[41] out of about 1,200 (see p. 8 n.5 *supra*)

[41]*I.e.*, 22 blacks actually employed in 1973-74 plus the 54 applicants identified at trial (Pl. Ex. 49), less one (Reid) who turned down a job of-
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— no greater than a 5.7 percent share. And the court of appeals found no fault in Hazelwood's rejection of all but 16 applicants; accordingly, even if Hazelwood had hired all 16 as to whom the court of appeals found discrimination, the District's professional faculty would have included only 38 blacks out of 1,200 — a share no larger than 3.1 percent.

The demonstrable absence of qualified black applicants in the 1970's is complemented by the fact that the lower court's labor market workforce standard levies an impossible burden on all the St. Louis County school districts. It is obvious that if the City of St. Louis adheres to its goal of 50 percent black representation on its teaching staff — more than three times the "average" endorsed by the court of appeals — then all or most of the County school districts must employ fewer than the "average" number of blacks. Not every employer can be "average" if the dominant single employer is so far above the "average." This proposition requires no extended proof: if the City employs one fourth of all teachers in the labor market, and ensures that 50 percent of its workforce is black, while the County districts raise their average black employment to 15 percent, the labor market workforce will be 23.8 percent black. And the County districts will still be considered deficient in their employment practices.

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[41](continued)
fer, one (Carol Jackson) who was in fact employed by Hazelwood, three (Boyd, Catlin and Ealy) who lacked the vocational certification required for the positions they sought, and another (Cotton) who applied for a specialty Hazelwood did not offer. See p. 67, *infra*.



## III. THE EVIDENCE AS TO 14 BLACK APPLICANTS WHO WERE NOT INTERVIEWED AND TWO OTHERS WHO WERE INTERVIEWED BUT NOT HIRED DOES NOT SHOW OR TEND TO SHOW THAT HAZELWOOD DISCRIMINATED IN HIRING, AND THE HANDLING OF THE 16 CASES DEMONSTRATES THAT HAZELWOOD'S HIRING PROCEDURES WERE APPLIED FAIRLY TO BLACKS.

The court below made a ritual bow to the need to be cautious in the use of statistical evidence. (Pet. App. B 8b.) Further, it indicated that the comparative workforce-labor market statistical evidence on which it relied did not stand alone. It said that it had been "considered in the light of Hazelwood's hiring procedures . . . ." (*Id.* at 14b.) It said that the statistical proof was buttressed by the showing of Hazelwood's history of employment of blacks. (*Id.*) And it said that the statistical proof was buttressed also by the showing that Hazelwood had rejected the 16 black applicants whose cases it discussed. (*Id.*)

We have seen that the court was far from cautious in its approach to statistics but instead adopted wholesale a statistical approach that inevitably led it far astray. We have seen that the history to which the court referred is of little if any relevance to the statutory period here, which began in 1972. As for the hiring procedures, however "vague and subjective" the criteria for employment decisions that Hazelwood used, the procedures generally and the criteria criticized by the court are neutral on their face and import nothing as to discrimination save as there is proof that they were improperly manipulated in order to discriminate. We have seen that this was not the case as a general matter — that statistically, black applicants for teaching positions appear to have been favored, not disfavored.

There remain the cases of the 16 unsuccessful black applicants. We undertake here to show that these cases

do not at all buttress the statistical proof on which the court primarily relied and that, in fact, the court's finding that prima facie cases of discrimination were made as to the 16 applicants is explicable only on the assumption that a pattern or practice of discrimination had been proved and on the assumption that these applicants — only 16 of 52 that the Government presented — must have been the individual victims. No question has been presented by us on certiorari specifically concerning the correctness of the court of appeals' judgment as to the 16 cases — this Court, we recognize, does not sit to resolve disputes over the weight of evidence — but we wish to rebut any suggestion that the decision below is sustainable independently on the basis of the 16 cases without regard to the fatally flawed statistics. At the very least, if we are right about the errors in the court's decision otherwise, we are entitled to a remand for reconsideration of the 16 cases untainted by a prior error-infected finding of a pattern or practice of discrimination. Further, the discussion hereunder should emphasize the point that Hazelwood's hiring procedures not only were neutral on their face but also were not manipulated to the disadvantage of black applicants.

### A. Hazelwood's Two-Step Hiring Process, Involving First Selection for Interviews and Then Interviews, Is Not a Racially Discriminatory Process on Its Face.

Hazelwood's hiring process operates in the following manner:

Applications are received at all times by the District's personnel director. When Hazelwood receives an application, the personnel director acknowledges receipt and files the application, recording in a card file the applicant's stated grade and subject preferences. Applications not acted on are discarded after one year, although applicants are notified of their opportunity to reactivate their applications



and thus avert such a disposition. The personnel director does no hiring or formal interviewing and speaks personally only to those applicants who happen to visit his office. (App. 27-29.)

When a teaching vacancy occurs or is projected by the principal of one of Hazelwood's 23 schools, the coordinator of elementary or secondary education, as appropriate, requests the personnel director to provide a given number of applicants for interview. The number of applicants requested depends on such factors as the number of simultaneous vacancies, the subject area involved and other considerations the requesting administrator may consider significant. (App. 15, 29-31.) There is a range of two or three up to as many as 10 per opening. (App. 15, 31, 41.) The personnel director does not evaluate or screen applicants, except to verify that the minimum qualifying credentials are asserted. He merely uses his card file to identify the specified number of applicants whose expressed preferences match the administrator's request. Some preference is given to applicants whose forms have only recently been received or who have recently expressed a current interest in employment.[42] The personnel director then contacts the selected applicants to arrange for their appearance for interviews. (App. 29-30.) One consequence of this procedure is that the personnel director does not necessarily refer for interviews all applicants with the requisite specialties and preferences; he or his secretary merely pulls a certain number of cards, and no separate effort is made to ascertain that every applicant is referred for an interview.

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[42] App. 30. Hazelwood's personnel director testified that the number of applications in recent years is greater than can be handled and, in effect, that the applicants who have more recently shown a new or continuing interest are contacted first because they are more likely to be available. (*Id.*)

Depending on the subject, grade level, and number of positions to be filled, applicants may appear in a group for orientation talks, followed by individual interviews at one or more schools. An applicant may be interviewed by a principal, assistant principal, and department chairman or may meet only with the principal whose school is in need of a new teacher. Each interviewer completes a standardized evaluation sheet on each applicant and makes a recommendation to the coordinator of elementary or secondary education. On occasion, where several administrators have interviewed one or more applicants, the interviewers meet to exchange observations and arrive at a collegial ranking prior to making a final recommendation to the school district's superintendent. (App. 21, 24-25, 39, 46-47, 64.) In practice, the recommendation of the interviewing department chairman or principal is nearly always followed. (App. 46.)

While the assessments made by the various interviewers are necessarily dependent to some degree on their own experience and educational philosophy, there are some general principles applicable throughout the Hazelwood schools. Advanced degrees and lengthy experience are not necessarily favored; all witnesses agreed that a prospective teacher's attitude toward his work and toward pupils is much more important. (App. 22, 26, 27, 51, 68-69, 78-79.) All interviewers look for traits such as quality of expression, manner around children, personal appearance, and voice quality — all reflective of the demands of classroom teaching. (App. 22, 26, 50-51.) Some interviewers ask applicants to resolve hypothetical classroom situations; some discuss educational philosophy and instructional methods. (App. 21.) Some administrators interview applicants alone; others have associates sit in. Their methods vary — as do their personal approaches toward teaching — but they share one goal: the selection of the "best possible" or "best



qualified" teachers for the Hazelwood schools.[43] The interviewing process is indeed "subjective," to the extent that it calls for an assessment of professional qualifications irreducible to forms susceptible of quantitative measurement.[44]

If an administrator does not recommend employing an applicant for the specific position for which he was interviewed, he may still suggest to Hazelwood's personnel director that the application be held for consideration in case other vacancies open in the future. However, if an applicant is neither offered a job nor "held" for possible referral to another interview pursuant to an administrator's recommendation, he is not generally invited back to compete for another vacancy. (See, *e.g.*, App. 49.) Thus, the court of appeals was incorrect in concluding, as it apparently did, that an applicant is in competition for all positions that open after his application is received by Hazelwood. To the contrary, Hazelwood typically affords an applicant no more than one opportunity to impress a principal with his qualifications.

Hazelwood's hiring process, then, involves two discrete steps: (1) selection for interview, and (2) interview, evaluation, and recommendation. The first step involves a "neutral" practice that includes no evaluation of an applicant's qualifications and also operates to permit only

[43]Hazelwood's principals and administrators uniformly testified they sought "the most competent teachers" (App. 18); "the best possible applicant" (App. 21); the "person that can do the job best" (App. 25); "the best candidate for the position" (App. 48); "the most competent person available" (App. 60); "the best qualified person for the position" (App. 65).

[44]The task of interviewing applicants for professional employment draws upon skills acquired by the interviewer during his own career. Moreover, Hazelwood's administrators are not necessarily left to their own instincts in conducting interviews; one principal testified that he had taken college courses and workshop training, the latter conducted by Hazelwood, to develop his skills in interviewing. (App. 66.)

some fraction of applicants to move on to the next step of the process. The second step is not mechanical; the interviewing administrator is called upon to assess those professional qualities that cannot be measured by reading an application form prepared by the applicant. Since in most instances several applicants are interviewed for a single vacancy, the evaluation process also permits interviewers to make comparative judgments in order to select the most qualified applicant.

Neither step in Hazelwood's hiring process by the farthest stretch constitutes a violation of Title VII. The first step — the neutral practice of selection for interview — does not by its nature cause a disproportionate exclusion of black applicants. It is a wholly reasonable device for reducing a flood of applicants to a smaller flow that can be dealt with by administrators.[45] The second step likewise has no inherent tendency to exclude blacks from employment in disproportionate numbers; moreover, it is a legitimate hiring tool used in so many situations with which the Justices of this Court are familiar, including the selection of their own law clerks, that to catalogue them would be pointless. And neither the first step, as applied to 14 applicants identified by the court of appeals, nor the second step, as applied to two others, was shown on this record to have operated in such a way as to make out a prima facie case of discriminatory treatment.

### B. Hazelwood Did Not Discriminate in the Selection of Applicants To Be Interviewed.

If the process by which Hazelwood selects applicants for interviews is neutral on its face, *i.e.*, not racially based, as we have just shown, then it can only be violative of Title VII

[45]Hazelwood's coordinator of secondary education testified that "we just haven't got the time to interview all the people that apply." (App. 41.)



if in application it excludes a disproportionate number of blacks. *See Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).[46] There was no showing of such a disparate impact. In fact, the evidence is that black applicants were *not* excluded from interviews in disproportionate numbers.

Hazelwood's personnel director supplies for interview the requested number of applicants whose application forms indicate interest and minimal qualification (*i.e.*, teacher certification) in the appropriate field and grade level. He does so by delving into his card file — favoring only the applicants more recently heard from — until he has pulled the requested number of names for referral. The results of the personnel director's actions demonstrate that black applicants are not excluded from job referrals in disproportionate numbers. The Government presented evidence as to 52 black applicants to whom Hazelwood did not offer employment. (Pl. Ex. 49.) Of these, one (Cotton) applied for a position in special education, which Hazelwood does not provide (Tr. 83-85); three others (Boyd, Catlin, and Ealy) lacked the vocational certificate required for the business education positions they sought (Tr. 49, 55, 64; Pet. App. A 7a, 8a, 15a), and one of those (Ealy) may in any event have been applying for a position already filled (Tr. 321). Of the remaining 48, at least seven were interviewed for positions;[47] another (Thompson) was invited to an in-

[46]Disparate racial impact was only one of the conditions that the *Griggs* Court held would, in combination, constitute a violation of Title VII. In *Griggs* the employment practices involved were not reasonably related to job performance, and the burden of a disparate racial impact fell on the shoulders of employees who were already victims of past, purposeful discrimination by the employer. 401 U.S. at 432. Here neither of those two factors is present.

[47]These were Carson (Pl. Ex. 49), Ellis (Tr. 169), Fletcher (Tr. 216), Kincaid (Tr. 201), Lockett (Tr. 183), Gerald Trotter (Pl. Ex. 49), and Jerome Trotter (Tr. 197-98). This list, based on all the record evidence, varies to some extent from the information set forth in Pl. Ex. 49, which was to that degree incorrect.

terview, but was "unable to attend" (Pl. Ex. 49); and one other (Florez) was invited to attend an interview but had already accepted another position (Tr. 129). In addition, at least 16 other black applicants, including one listed by the Government as an unsuccessful, uninterviewed applicant,[48] were hired for faculty positions, and still another, also listed as an unsuccessful applicant, was in fact offered a job but did not accept.[49] Since an interview was a prerequisite to a job offer, it follows that these 17 were interviewed. Thus, of 65 minimally eligible black applicants, 26 were referred for interviews — a rate of 40 percent.

The record does not show what proportion of applicants generally were interviewed, but there is no reason to think it was significantly different from the 40 percent rate that obtained for blacks. In any event, the burden of establishing any such difference lay with the Government, which was attempting to prove a violation of Title VII, and absence of conclusive evidence on this point means only that the Government failed to carry its burden in this regard.

The court of appeals found prima facie showings of discrimination with respect to 14 applicants who were not interviewed. These applicants were excluded by operation of a process not shown itself to be violative of Title VII. The demonstrated legitimacy of this process, without regard to the specific facts of each case, should control. But if those cases are examined, they do not suggest any impropriety in the practice.

The Government has singled out five of the 16 cases discussed by the court of appeals by designating the record evidence pertaining to them for reproduction in the appendix. Four of these are cases of applicants who were not interviewed. They serve as well as any others to illustrate our point.

[48]Carol A. Jackson (Tr. 32).

[49]Reid (Tr. 186-194).



**Cynthia Edmond,** whose race would have had to be inferred from her attendance at a college in Georgia that a standard source lists as having a student body predominantly made up of black students, applied for a position as a secondary school social studies teacher. She applied in July 1972 and, according to her testimony, "understood there were no vacancies available" at that time (App. 86), apparently because Hazelwood's receptionist told her "there were approximately five hundred teachers on the waiting list" (App. 85). At Hazelwood's invitation, she renewed her application for 1973-74. (App. 86.) The court of appeals believed that five whites were hired as social studies teachers for 1972-73 "after Edmond was told no vacancies existed." (Pet. App. B 19b.) But the evidence shows that only three persons known to have been interviewed after Edmond applied were hired for that school year; moreover, Edmond did not testify that any Hazelwood officer or employee had told her there were no vacancies in her field. And the court failed to note that, of the nine[50] persons hired for social studies positions in the 1973-74 school year, one was black. (Pl. Ex. 49.)[51]

**Robert Howell** also applied for a secondary social studies position but only for 1973-74. (App. 338-39.) He was not interviewed, although he had hoped that his experience as a student teacher at Hazelwood in 1971 would work in his favor. Ten other persons were, as the court of appeals observed, hired for secondary social studies positions after Howell applied; however, as in Edmond's case, the court erred in referring to them all as whites (Pet. App. B 17b), since one was black.

[50]Or 10, see the discussion of the applicant Howell, *infra*.

[51]The court of appeals also erred in stating that Edmond's college grade point average in her major was a superior 3.9 on a 4.0 scale (Pet. App. B 19b); in fact, she testified that her average was only 3.3 in her major and 2.9 overall (App. 85). The quality of her academic record was not, in any event, revealed on her application form (App. 330-337), which is all that those who selected applicants for interviews had before them.

**Willie Palmer** applied for a position as a reading specialist at the elementary level or in junior or senior high school, an administrator or science teacher at the elementary level or a media specialist or "curriculum lab" in junior or senior high school for 1972-73. He ambiguously listed "teacher in elementary grades" on his application form along with "public relations" as among "other positions" desired, *i.e.*, other than "elementary level" or "junior or senior high school." (App. 346-47.) As the court of appeals acknowledged, although Palmer was a man of mature years with a substantial body of experience in both teaching and industry by the time he applied to Hazelwood, he lacked the master's degree required for a science teaching position. (Pet. App. B 24b; App. 91.) He was not interviewed. (App. 87-91.) The court of appeals believed it to be significant that, after Palmer applied, 57 other persons were hired "to teach elementary school or reading during the 1972-73 school year." (Pet. App. B 24b-25b.) But of the 57 successful applicants noted by the court, only three were hired as reading or language arts teachers. The others were elementary grade teachers, and it was surely not irrational for Hazelwood to think it pointless to refer a 43-year-old who according to his application had not been responsible for an elementary classroom for more than 10 years to compete for the job of generally instructing and supervising a first, second, third or even sixth grade class. In fact, only one applicant was hired as a "reading specialist," and she had experience comparable to Palmer's. A language arts teacher was also hired for 1972-73, and she (Gerst) was black. A second language arts teacher was hired for the 1973-74 school year, not the 1972-73 year for which Palmer applied. (Pl. Ex. 49.)

**Georgia Shaw** applied for a position as an elementary school teacher (grade preferences: 3, 4, 5, 2, 1, 6) for 1973-74. She had received a favorable evaluation of her student teaching experience at Hazelwood. (App. 406-07.) Shaw was not interviewed. She did not testify. As the court of appeals found, several other applicants were hired for elementary positions. (Pet. App. B 21b-22b.)



And that is the sum of it: two black applicants for social studies teaching jobs who were not interviewed for jobs for which at least one other black applicant was interviewed and hired; an experienced teacher, who was not minimally qualified for some of the jobs that he applied for and who professed a willingness to take a $3,000 salary cut to get back into teaching from industry (App. 350), who was not interviewed for the specialized position that he was primarily interested in and for which he was qualified — and which was filled by another black and a white person of comparable experience; and a former student teacher in the District, who had impressed her supervisor in that capacity, who was not interviewed for an elementary classroom teacher's job. The latter case, that of Miss Shaw, may be puzzling on the face of things —one wishes that she had testified — but it is not without more the basis for a finding of discrimination. The other cases do not even puzzle.

None of the cases, those discussed here or the other 10, presents the kind of material on which a finding of employment discrimination could be based, as is confirmed when the nature of the findings made by the court of appeals as to Hazelwood's hiring process is considered. The court of appeals' criticism was of lack of standards for hiring, of "an unstructured decentralized hiring process in which subjective criteria predominate in evaluating candidates," of "subjectively-based selection procedures" and of "the use of vague and subjective criteria." (Pet. App. B 12b-14b.) To the extent that there is any validity to that body of criticism, it applies only to the interviewing stage of the hiring process. It has nothing to do with the selection of applicants for interviews, which is where 14 of the court of appeals' 16 applicants lost out. Nothing in the general description of the interview-selection process or in the cases of four, 14 or 37 blacks who were not selected for interviews (in a period in which 26 blacks were selected) suggests or even hints anything remotely like administration of a

system "fair on its face and impartial in appearance . . . with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances," *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

On a more technical level, it cannot be said that the 14 applicants not selected for interviews satisfied the requirements of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), as the court of appeals said that they did (Pet. App. B 15b-16b). The Court said in *McDonnell Douglas* that an individual complainant in a Title VII trial can make a prima facie case by showing:

> "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

None of the 14 black applicants can be held as a matter of law to be "qualified" for employment by Hazelwood, as that term is used in the *McDonnell Douglas* rule. None of the 14 has met personally with a Hazelwood school principal, and none has been evaluated in an interview situation or compared to other available job applicants. Unless teachers are to be hired strictly on the basis of their own self-serving recitations as set forth in their written applications, the court of appeals' 14 uninterviewed applicants cannot be said to be "qualified" for employment.

This failure of proof is accentuated by the nature of the relief ordered by the court of appeals with respect to these 14. Hazelwood is required, *inter alia*, to offer the next available positions to these applicants, persons whose educational philosophy, response to classroom situations, attitude toward children, quality of speech, and personal



appearance have never been measured. Moreover, while applicants who are interviewed are evaluated in competition with others, the court of appeals has held these 14 to possess such merit that they should be spared that competitive process in which only a minority of applicants triumph.[52] The lower court's examination of the paper credentials of each applicant — with its express emphasis on advanced degrees and years of experience, criteria that are not in themselves favored by Hazelwood — emphasizes the error of the court's attempt to substitute its judgment for the school district's in weighing the qualifications of teachers.

### C. Hazelwood Did Not Discriminate in the Selection of New Employees from among Those Applicants Who Were Interviewed.

The second step in Hazelwood's hiring process — interviewing applicants and selecting from among those interviewed the ones to whom job offers will be made — does not result in the exclusion from employment of a disproportionate number of blacks; for that reason, if for no other, it is not an employment practice prohibited by Title VII. But the practice would survive even a showing of disparate effect — not made in the present case — because it is a legitimate, job-related employment tool.

The Government presented no evidence as to the number of applicants who are actually interviewed by Hazelwood and similarly presented no evidence as to the relative success rates of blacks and non-blacks who encounter this phase of Hazelwood's hiring process. Since the burden of

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[52] James Washington, one of the 14, testified that he applied to seven or eight school districts in St. Louis County but for several months could find work only as a substitute teacher. (Tr. 123-25.) The court of appeals gave no reason why Washington should be held qualified to teach at Hazelwood when he was rejected nearly everywhere else.

proving a disproportionate exclusion of blacks lies with the party alleging a violation of Title VII, it is apparent that the Government failed to sustain its burden in this respect. The evidence does show, however, that of 24 black applicants known to have been interviewed, 17 received job offers[53] — a rate of 70.8 percent. Although the record does not provide a basis for comparing this rate directly with the rate for non-black applicants, an estimate as to that rate may be inferred from the evidence that — where a sufficient number of eligible applicants are available — several applicants may be interviewed for each vacancy. Whatever the precise statistics, there is obviously no reason to believe that blacks are excluded in disproportionate numbers by the interview-and-evaluation process. To the contrary, blacks have fared exceptionally well in their competition with other applicants.

Although the court of appeals scorned Hazelwood's hiring practice as "standardless" and — because of its "subjective" nature — susceptible of discriminatory application, the fact is that Hazelwood seeks the "best qualified" teachers. The school principals and other administrators who interview job applicants and make the crucial recommendations for employment, far from treating this standard as a license to exercise personal whim, devote considerable effort to the interview-and-evaluation process. They are, after all, professional educators, whose objective is not the conduct of an industrial assembly line or the management of an unskilled labor force, but rather the education of children.

The court of appeals overlooked the professional nature of the employment involved here. Unlike Green in *Mc-*

[53] See pp. 67-68, *supra*. Another applicant who was interviewed (Catlin) turned out to lack minimum certification for the job she sought (see p. 67, *supra*) and is therefore excluded in this computation.



*Donnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) — a former employee whose qualifications to perform his job were not in dispute — and unlike the rejected applicants in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) — who were barred by a sweeping employment practice from even demonstrating their abilities to perform the jobs in question — an applicant who interviews for a Hazelwood job cannot be said to be "qualified" to teach in a Hazelwood school simply on the basis of the representations he has made on his application form. Although the court of appeals indicated that it would accord recognition to "objective" standards used in the hiring of teachers, the court did not suggest where in the education profession there might be found "objective" measures of an applicant's attitude toward children, quality of speech, poise, and even personal appearance — qualities that are highly relevant to the hiring of teachers and that can only be evaluated by means of interviews.

Moreover, the teaching profession, like other professions, displays a variety of philosophies concerning, and approaches toward, the accomplishment of the basic educational task at hand. It is a school's principal who is supervisor of the instructional activities at the school (*e.g.*, App. 63); and it is legitimately within the principal's area of responsibility to select his school's teachers by means that expose and consider the issue whether an applicant's views on crucial matters of educational philosophy are compatible with his.

The court below some years ago commented on the inherent subjectivity of the process by which the qualifications of teachers must be judged:

> "We recognize that teaching is an art and that excellence does not depend upon knowledge, experience, formal training and classroom conduct alone. Fitness for teaching rests upon a broad range of factors and

encompasses numerous personality and character traits. In addition, the particular needs of a school district may at times genuinely require that weight indeed be given to an applicant's ability to teach more than one subject, or, in addition to teaching, to supervise extracurricular activity. Nothing contained in this opinion is intended to be restrictive of a school board's freedom to make full inquiry and to give full consideration to an applicant's qualifications and the district's needs in filling vacancies so long as the board does not act unreasonably, arbitrarily, capriciously, or unlawfully." *Smith* v. *Board of Education of Morrilton School District No. 32*, 365 F.2d 770, 781-82 (8th Cir. 1966) (Blackmun, J.) (citations omitted). *Accord*, *Chance* v. *Board of Examiners*, 330 F. Supp. 203, 214 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d. Cir. 1972).

The issue, then, is not whether the underlying criteria are judgmental; it is whether those criteria are fairly applied.

The lower courts have not often considered how, in Title VII cases involving the employment of professionals, the necessary resort to standards not easily reduced to objective measurement is to be judged. That issue will not always be addressed in such cases since an employer is not required to establish the job-relatedness of his practices until the challenging party has established that those practices produce an adverse disparate impact on a protected minority. But where the issue has been considered, recognition has been given to the difference between the employment of professionals and the hiring of less skilled labor. In *Coopersmith* v. *Roudebush*, 517 F.2d 818 (D.C. Cir. 1975), for example, the court considered a Title VII sex discrimination challenge to two practices used by a federal employer in the hiring of attorneys: a preference for applicants with recent legal experience, and the evaluation of the applicant's written response to a "test problem" designed to simulate one of the tasks performed by at-



torneys in the jobs in question. Adopting the position urged by the United States, the court found the rejected applicant had not established that the use of either of these practices operated to exclude women disproportionately from employment and then went further, deliberately upholding both the recent-experience requirement and the use of a test problem as job-related even though an evaluation of the quality of an applicant's experience and response to a test problem necessarily depends on the "subjective" judgment of the persons who select new employees.

It is clear that the process by which Hazelwood evaluates the job applicants it interviews has not worked to the disadvantage of blacks. The inquiry, we contend, should stop there. But we shall examine the case of the one of two individual interviewed applicants, as to whom the court of appeals found a prima facie showing of discrimination, that the Government has selected for the appendix. For that case, far from serving as a specific example of discrimination, illustrates the Government's failure to prove discriminatory conduct by Hazelwood.

**Timotheus Carson** applied for a position teaching secondary English, French, or German for the 1972-73 school year. (App. 309-10.) He was interviewed for a position teaching English at the senior high school. Although the court of appeals stated that Carson was rated "very highly" by his interviewer (Pet. App. B 21b), in fact the ratings entered on Carson's interview sheet were only average or slightly above (App. 317-18). Although the court of appeals thought that 23 persons were hired "in Carson's field" after he applied (*id.*), the Government's evidence showed only that seven persons who were interviewed after Carson applied were hired for senior high school English positions through the end of 1972 (Pl. Ex. 49). The court of appeals apparently considered Carson's 10 years of experience and master's degree as showing his fitness for employment, disregarding the evidence that established that neither ex-

perience nor an advanced degree is necessarily favored by Hazelwood.[54]

Carson's case proves nothing. Some others who were interviewed about the same time as he was for high school English teaching jobs impressed their interviewer more than he. That is all. No inference can fairly be drawn that he suffered in the interview process from being black.[55]

## CONCLUSION

The judgment of the court of appeals should be reversed. If the Court accepts our constitutional argument, the case should be remanded with instructions to reinstate the district court's original judgment for defendants on the ground that what the Constitution requires to be proved to warrant the imposition of Title VII sanctions on the Hazelwood School District was not proved. If the Court does not agree with us on that point, the case should be remanded for reconsideration of the alleged individual cases of discrimination by a court disabused of the erroneous notion that statistics showed Hazelwood engaging in a pattern or practice of discrimination against

[54]In the process of substituting its judgment for that of Hazelwood's administrators, the court of appeals also erred in evaluating the record of Ellis, the other applicant who was interviewed but rejected as to whom it found discrimination. The court thought that Ellis had "seven years of teaching experience" (Pet. App. B 20b), but in fact she had taught for only one year after receiving her teaching degree (Pl. Ex. 12). Moreover, the two principals who interviewed Ellis testified that she had not been the best qualified applicant for the positions for which she was considered. (App. 13, 78.)

[55]Although Carson was present at trial, he did not testify. (Pet. App. A 16a.)



black applicants for teaching positions. There has been no such showing.

Respectfully submitted,

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